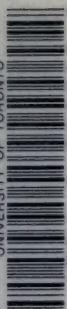



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**RACE DISTINCTIONS
IN AMERICAN LAW**



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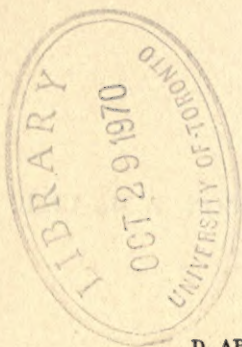
RACE DISTINCTIONS IN AMERICAN LAW

BY

GILBERT THOMAS STEPHENSON, A.M., LL.B.



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TO MY
FATHER AND MOTHER



P R E F A C E

AMERICA has to-day no problem more perplexing and disquieting than that of the proper and permanent relations between the white and the colored races. Although it concerns most vitally the twenty millions of Caucasians and the eight millions of Negroes in eleven States of the South, still it is a national problem, because whatever affects one part of our national organism concerns the whole of it. Although this question has been considered from almost every conceivable standpoint, few have turned to the laws of the States and of the Nation to see how they bear upon it. It was with the hope of gaining new light on the subject from this source that I undertook the present investigation.

I have examined the Constitutions, statutes, and judicial decisions of the United States and of the States and Territories between 1865 and the present to find the laws that have made any distinctions between persons on the basis of race. Reference has been made to some extent to laws in force before 1865, but only as the background of later legislation and decision. In order to make this study comparative as well as special, the writer has abandoned his original plan of confining it to the Southern States and laws applicable only to Negroes, and has ex-

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tended it to include the whole United States and all the races.

Immediately after the Negro became a free man in 1865, the Federal Government undertook, by a series of constitutional amendments and statutory enactments, to secure to him all the rights and privileges of an American citizen. My effort has been to ascertain how far this attempt has been successful. The inquiry has been: After forty-five years of freedom from physical bondage, how much does the Negro lack of being, in truth, a full-fledged American citizen? What limitations upon him are allowed or imposed by law because he is a Negro?

This is not meant, however, to be a legal treatise. Although the sources are, in the main, constitutions, statutes, and court reports, an effort has been made to state the principles in an untechnical manner. Knowing that copious citations are usually irksome to those who read for general information, I have relegated all notes to the ends of the chapters for the benefit of the more curious reader who often finds them the most profitable part of a book. There he will find citations of authorities for practically every important statement made.

All the chapters, except the last two, were published serially in *The American Law Review* during the year 1909. The substance of the chapter on "Separation of Races in Public Conveyances" was published also in *The American Political Science Review* for May, 1909.

I wish that I could make public acknowledgment of my indebtedness to all who have helped me in the preparation of this volume. Hundreds of public officials in the South—mayors of cities, clerks of courts, attorneys-gen-

PREFACE

eral, superintendents of public instruction, etc.—have responded generously to my requests for information. I am thankful to Mr. John H. Arnold, Librarian of the Harvard Law School, for access to the stacks of that library, without which privilege my work would have been greatly delayed, and to his assistants for their uniform courtesy while I was making such constant demands upon them. I am under especial obligation to Professor Albert Bushnell Hart, of Harvard University, for his direction and assistance in my examination of the sources and his valuable advice while I have been preparing the material for publication in this form; also to Mr. Charles E. Grinnell, former Editor of *The American Law Review*, for his encouragement and suggestions during the preparation of the articles for his magazine. Lastly, I would express my gratitude to Mr. Charles Vernon Imlay, of the New York Bar, the value of whose painstaking help in the revision of the manuscript of this book is truly inestimable.

GILBERT THOMAS STEPHENSON.

WARREN PLACE, PENDLETON, N. C.
June 1, 1910.

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RACE DISTINCTIONS IN AMERICAN LAW

CHAPTER I

INTRODUCTORY

WHAT IS A RACE DISTINCTION IN LAW?

A RACE distinction in the law is a requirement imposed by statute, constitutional enactment, or judicial decision, prescribing for a person of one race a rule of conduct different from that prescribed for a person of another race. If, for instance, a Negro is required to attend one public school, a Mongolian another, and a Caucasian a still different one, a race distinction is created, because the person must regulate his action accordingly as he belongs to one or another race. Or, if a person, upon entering a street car, is required by ordinance or statute to take a seat in the front part of the car if he is a Caucasian, but in the rear if he is a Negro, this rule is a race distinction recognized by law. Again, a race distinction is made by the law when intermarriage between Negroes and Caucasians is prohibited.

Distinctions in law have been made on grounds other than race. Thus, in those States in which men may vote by satisfying the prescribed requirements, but in which women may not vote under any circumstances, the law

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creates a distinction on the basis of sex. Laws forbidding persons under seven years of age from testifying in court and laws exempting from a poll tax persons under twenty-one years of age give rise to age distinctions. Other instances might be cited, but only race distinctions have a place here.

DISTINCTIONS AND DISCRIMINATIONS CONTRASTED

It is important, at the outset, to distinguish clearly between race *distinctions* and race *discriminations*; more so, because these words are often used synonymously, especially when the Negro is discussed. A distinction between the Caucasian and the Negro, when recognized and enforced by the law, has been interpreted as a discrimination against the latter. Negroes have recognized that they are the weaker of the two races numerically, except in the Black Belt of the South, and intellectually the less developed. Knowing that the various race distinctions have emanated almost entirely from white constitution-makers, legislators, and judges, they regard these distinctions as expressions of the aversion on the part of the Caucasian to association with the Negro. Naturally, therefore, they have resented race distinctions upon the belief and, in many instances, upon the experience that they are equivalent to race discriminations.

In fact, there is an essential difference between race distinctions and race discriminations. North Carolina, for example, has a law that white and Negro children shall not attend the same schools, but that separate schools shall be maintained. If the terms for all the public schools

DISTINCTIONS AND DISCRIMINATIONS

in the State are equal in length, if the teaching force is equal in numbers and ability, if the school buildings are equal in convenience, accommodations, and appointments, a race distinction exists but not a discrimination. Identity of accommodation is not essential to avoid the charge of discrimination. If there are in a particular school district twice as many white children as there are Negro children, the school building for the former should be twice as large as that for the latter. The course of study need not be the same. If scientific investigation and experience show that in the education of the Negro child emphasis should be placed on one course of study, and in the education of the white child, on another; it is not a discrimination to emphasize industrial training in the Negro school, if that is better suited to the needs of the Negro pupil, and classics in the white school if the latter course is more profitable to the white child. There is no discrimination so long as there is equality of opportunity, and this equality may often be attained only by a difference in methods.

On the other hand, if the term of the Negro school is four months, and that of the white, eight; if the teachers in the Negro schools are underpaid and inadequately or wrongly trained, and the teachers of the white schools are well paid and well trained; if Negro children are housed in dilapidated, uncomfortable, and unsanitary buildings, and white children have new, comfortable, and sanitary buildings; if courses of study for Negro children are selected in a haphazard fashion without any regard to their peculiar needs, and a curriculum is carefully adapted to the needs of white children; if such condi-

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tions exist under the law, race distinctions exist which are at the same time discriminations against Negroes. Where the tables are turned and Negro children are accorded better educational advantages than white, the discriminations are against Caucasians.

A law of Virginia requires white and Negro passengers to occupy separate coaches on railroad trains. If the coaches for both races are equally clean, equally comfortable, and equally well appointed; if both races are accorded equally courteous service by the employees of the railroad; if, in short, all the facilities for travel are equal for both races, race distinctions exist but not race discriminations. The extent of accommodations need not be identical. The railroad company, for instance, need furnish only the space requisite for the accommodation of each race. If, however, the white passengers are admitted to clean, well-lighted, well-ventilated coaches and Negroes, to foul, unclean, uncomfortable coaches; if white coaches are well-policed, while Negro passengers are subjected to the insults of disorderly persons; if, in other words, the Negro passenger does not receive as good service for his fare as the white, a discrimination against the Negro is made under the guise of a legal distinction.

In like manner, one might consider each of the race distinctions recognized in the law and show how it may be applied so as not to work a discrimination against either race and, as easily, how it may be used to work an injustice to the weaker race. A race distinction connotes a difference and nothing more. A discrimination necessarily implies partiality and favoritism.

LEGAL AND ACTUAL DISTINCTIONS

LEGAL AND ACTUAL DISTINCTIONS

There is a difference between actual race distinctions—those practiced every day without the sanction of law—and legal race distinctions—those either sanctioned or required by statutes or ordinances. Law is crystallized custom. Race distinctions now recognized by law were habitually practiced long before they crystallized into statutes. Thus, actual separation of races on railroad coaches—if not in separate coaches, certainly in separate seats or portions of the coach—obtained long before the “Jim Crow” laws came into existence. Moreover, miscegenation was punished before the legislature made it a crime. Some race distinctions practiced to-day will probably be sanctioned by statute in the future; others will persist as customs. In some Southern cities, for instance, there are steam laundries which will not accept Negro patronage. Everywhere in the South and in many places in other sections, there are separate churches for the races. It is practically a universal custom among the white people in the South never to address a Negro as “Mister” or “Mistress.” This custom obtains to some extent elsewhere. Thus, in a recent case before a justice of the peace in Delaware in which the parties were Negroes, one of them insisted upon speaking of another Negro as “Mister.” The justice forbade him so to do, and, upon his persisting, fined him for contempt. Yet, these distinctions and many others that might be cited are not required by law, and some of them, if expressed in statutes, would be unconstitutional.

Most race distinctions, however, are still uncrystallized.

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But these will be mentioned merely for illustration, since the purpose here is to discuss only those distinctions which have been expressed in constitutions, statutes, and judicial decisions. Mr. Ray Stannard Baker in his "Following the Colour Line,"¹ has admirably depicted actual race relations in the United States. He has gone in person out upon the cotton plantations of the Lower South; into the Negro districts of cities in the South, East, and North; into schools, churches, and court rooms; and has described how the Negro lives, what he does, what he thinks about himself and about the white man, and what the white man thinks about him. By studying the race distinctions he describes from the other standpoint suggested—that is, by tracing their gradual crystallization into statutes and judicial decisions, a better understanding may be had of race distinctions in general.

ALL RACE ELEMENTS INCLUDED

Attention will be directed not only to the Negro but to other races in the United States—the Mongolian in the Far West and the Indian in the Southwest. Of course, by far the largest race element after the Caucasian is the Negro with its 8,833,994 people of whom eighty-four and seven-tenths per cent. are in the thirteen States of the South. But it will be found that in those sections where the Indians have existed or still exist in appreciable numbers and come into association with the Caucasian—that is, where they do not still maintain their tribal relations—race distinctions have separated these two races. This is equally true of the Japanese and Chinese in the Pacific

PERIOD COVERED FROM 1865 TO PRESENT

States. Most of the discussion will necessarily be of the distinctions between Caucasians and Negroes, but as distinctions applicable to Mongolians and Indians arise, they will be mentioned to show that race consciousness is not confined to any one section or race.

PERIOD COVERED FROM 1865 TO PRESENT

Race distinctions have existed and have been recognized in the law from the beginning of the settlement of the New World, long before the thirteen colonies became free and independent States, or before the Federal Constitution was adopted.. The first cargo of Negroes was landed in Virginia in 1619, only twelve years after the founding of Jamestown. In 1630, eleven years later, the Virginia Assembly passed the following resolution:² "Hugh Davis to be soundly whipped before an assembly of Negroes and others, for abusing himself to the dishonor of God and the shame of Christians, by defiling his body in lying with a Negro." Many of the Colonies—later States—prohibited intermarriage between Caucasians and Negroes whether the latter were slave or free. The Colonies and States prohibited or limited the movements of free Negroes from one colony or State to another, prescribed special punishment for adultery between white persons and Negroes, forbade persons of color to carry firearms, and in divers other ways restricted the actions of Negroes.

It is not so profitable, however, at this day to study these early distinctions, for the distinctions based on race were then inseparably interwoven with those based on the

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state of slavery. Thus, it is impossible to say whether a law was passed to regulate a person's actions because he was a slave or because he was of the Negro race. Moreover, the laws relating to race and slave distinctions prior to 1858 were compiled by John Codman Hurd in his two-volume work entitled "The Law of Freedom and Bondage in the United States," published in 1858. Any attempt at a further treatment of the period covered by that work would result only in a digest of a multitude of statutes, most of which have been obsolete for many years. But a greater reason for the futility of a discussion of race distinctions before 1865 is that prior to that date, as it has been so often expressed, the Negro was considered to have no rights which the white man was bound to respect. The Dred Scott decision³ in 1857 virtually held that a slave was not a citizen or capable of becoming one, and this dictum, unnecessary to the decision of the case, did much, says James Bryce,⁴ "to precipitate the Civil War." If the Negro could enjoy only licenses, claiming nothing as of right, it is not very valuable to study the distinctions which the master imposed upon him.

The year 1865 marked the beginning of the present era in race relations. It was in that year that the Negro became a free man, and that the Federal Government undertook by successive legislative enactments to secure and guarantee to him all the rights and privileges which the Caucasian race had so long enjoyed as its inalienable heritage.

The Emancipation Proclamation of 1862, issued as a military expedient, declared that, unless the seceding States were back in the Union by January 1, 1863, all

PERIOD COVERED FROM 1865 TO PRESENT

slaves in those States should be emancipated. This did not apply to the Union States, as Delaware, which still had slaves. But immediately upon the cessation of hostilities, Congress set to work to make emancipation general throughout the Union and to give the Negro all the rights of a citizen. The Thirteenth Amendment to the Constitution, ratified December 18, 1865, abolished slavery and involuntary servitude except as a punishment for crime. The following April, the first Civil Rights Bill^s was passed, which declared that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, . . . and to full and equal benefit of all laws and proceedings in the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishments and penalties, and to none other. . . ."

These rights were enlarged by the Fourteenth Amendment, ratified in 1868, which provides that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within

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its jurisdiction the equal protection of the laws." Though the word "Negro" is not mentioned in this Amendment nor in any of the subsequent Federal enactments, it is not open to dispute that the legislators had in mind primarily the protection of the Negro.

Under the Fourteenth Amendment, the Civil Rights Bill of 1866 was reenacted ⁶ in 1870, with the addition that it extended to all persons within the jurisdiction of the United States, and that it provided that all persons should be subject to like taxes, licenses, and exactions of every kind.

The same year, 1870, the Fifteenth Amendment was ratified, which declared that the right of citizens of the United States to vote should not be denied or abridged by the United States or by any States on account of race, color, or previous condition of servitude.

The Civil Rights Bill ⁷ of 1875, the most sweeping of all such legislation by Congress, declared that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. It also provided that jurors should not be excluded on account of race, color, or previous condition of servitude.

An enumeration of these Federal statutes and constitutional amendments has been made in order to show the efforts of Congress to secure to the Negro every civil

NOTES

and political right of a full-fledged citizen of the United States. Later they will be discussed in detail. By the Civil Rights Bill of 1875, Congress apparently intended to secure not only equal but identical accommodations in all public places for Negroes and Caucasians. If one looks only upon the surface of these several legislative enactments, it would seem impossible to have a race distinction recognized by law which did not violate some Federal statute or the Federal Constitution. But the succeeding pages will show that, under the shadow of the statutes and the Constitution, the legislatures and courts of the States have built up a mass of race distinctions which the Federal courts and Congress, even if so inclined, are impotent to attack.

NOTES

¹ Doubleday, Page & Co., 1908.

² 1 Hen. 146, quoted in Hurd's "Law of Freedom and Bondage," I, p. 229.

³ 19 How. 393 (1857).

⁴ "American Commonwealth," I, p. 257.

⁵ 14 Stat. L., 27, chap. 31.

⁶ 16 Stat. L., 144, chap. 114.

⁷ 18 Stat. L., 335, chap. 114.

CHAPTER II

WHAT IS A NEGRO?

LEGAL DEFINITION OF NEGRO

"I HAD not been long engaged in the study of the race problem when I found myself face to face with a curious and seemingly absurd question: 'What is a Negro?'" said Mr. Baker.¹

Absurd as the question apparently is, it is one of the most perplexing and, at times, most embarrassing that has faced the legislators and judges.

If race distinctions are to be recognized in the law, it is essential that the races be clearly distinguished from one another. If a statute provides that Negroes shall ride in separate coaches and attend separate schools, it is necessary to decide first who are included under the term "Negroes." It would seem that physical indicia would be sufficient, and, in most instances, this is true. It is never difficult to distinguish the full-blooded Negro, Indian, or Mongolian one from the other or from the Caucasian. But the difficulty arises in the blurring of the color line by amalgamation. The amount of miscegenation between the Mongolian and other races represented in the United States is negligible; but the extent of intermixture between the Caucasian and the Negro, the

LEGAL DEFINITION OF NEGRO

Negro and the Indian, and the Caucasian and the Indian is appreciable, and problems arising from it are serious.

It is absolutely impossible to ascertain the number of mulattoes—that is, persons having both Caucasian and Negro blood in their veins—in the United States. Mr. Baker² says: “I saw plenty of men and women who were unquestionably Negroes, Negroes in every physical characteristic, black of countenance with thick lips and kinky hair, but I also met men and women as white as I am, whose assertions that they were really Negroes I accepted in defiance of the evidence of my own senses. I have seen blue-eyed Negroes and golden-haired Negroes; one Negro girl I met had an abundance of soft, straight, red hair. I have seen Negroes I could not easily distinguish from the Jewish or French types; I once talked with a man I took at first to be a Chinaman but who told me he was a Negro. And I have met several people, passing everywhere for white, who, I knew, had Negro blood.”

A separate enumeration of mulattoes has been made four times—in 1850, 1860, 1870, and 1890 respectively. The census authorities themselves said that the figures were of little value, and any attempt to distinguish Negroes from mulattoes was abandoned in the census of 1900. If a person is apparently white, the census enumerator will feel a delicacy in asking him if he has Negro blood in his veins. If the enumerator does ask the question and if the other is honest in his answer, it is often that the latter does not know his own ancestry. Dr. Booker T. Washington, for instance, has said that he does not know who his father was.³ Marital relations among Negroes during slavery were so irregular, and illicit intercourse between

WHAT IS A NEGRO?

white men and slave women was so common that the line of ancestry of many mulattoes is hopelessly lost. But Mr. Baker makes the rough estimate, which doubtless is substantially correct, that 3,000,000 of the 10,000,000 (*circa*) Negroes are visibly mulattoes. This one third of the total Negro population represents every degree of blood, of color, and of physical demarcation from the fair complexion, light hair, blue eyes, thin lips, and sharp nose of the octoroon, who betrays scarcely a trace of his Negro blood, to the coal-black skin, kinky hair, brown eyes, thick lips, and flat nose of the man who has scarcely a trace of Caucasian blood. It is this gradual sloping off from one race into another which has made it necessary for the law to set artificial lines.

The difficulty arising from the intermixture of the races was realized while the Negro was still a slave. Throughout the statutes prior to 1860, one finds references to "persons of color," a generic phrase including all who were not wholly Caucasian or Indian. This antebellum nomenclature has been brought over into modern statutes. It is surprising to find how seldom the word "Negro" is used in the statutes and judicial decisions.

Some States have fixed arbitrary definitions of "persons of color," "Negroes," and "mulattoes"; others, having enacted race distinctions, have then defined whom they intended to include in each race. This has been done particularly in the laws prohibiting intermarriage. The Constitution of Oklahoma⁴ provides that "wherever in this Constitution and laws of this State, the word or words, 'colored' or 'colored race,' or 'Negro,' or 'Negro race,' are used, the same shall be construed to mean, or

LEGAL DEFINITION OF NEGRO

apply to all persons of African descent. The term 'white' shall include all other persons."

Taking up these definitions in the various States—many of them included within broader statutes—one finds that Alabama,⁵ Kentucky,⁶ Maryland,⁷ Mississippi,⁸ North Carolina,⁹ Tennessee,¹⁰ and Texas¹¹ define as a person of color one who is descended from a Negro to the third generation inclusive, though one ancestor in each generation may have been white. The Code Committee of Alabama of 1903 substituted "fifth" for "third," so that at present in that State one is a person of color who has had any Negro blood in his ancestry in five generations.¹² The laws of Florida,¹³ Georgia,¹⁴ Indiana,¹⁵ Missouri,¹⁶ and South Carolina¹⁷ declare that one is a person of color who has as much as one-eighth Negro blood: the laws of Nebraska¹⁸ and Oregon¹⁹ say that one must have as much as one-fourth Negro blood in order to be classed with that race. Virginia²⁰ and Michigan apparently draw the line in a similar way. In Virginia, a marriage between a white man and a woman who is of less than one-fourth Negro blood, "if it be but one drop less," is legal. A woman whose father was white, and whose mother's father was white, and whose great-grandmother was of a brown complexion, is not a Negro in the sense of the statute.²¹ In 1866, the court of Michigan, under a law limiting the suffrage to "white male citizens," held that all persons should be considered white who had less than one-fourth of African blood.²² That State gave the right to vote also to male inhabitants of Indian descent, but its court held that a person having one-eighth Indian blood, one-fourth or three-eighths African, and the rest white was not in-

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cluded in that class.²³ Ohio limited the suffrage to white male citizens and made it the duty of judges of election to challenge any one with a "distinct and visible admixture of African blood," but the latter requirement was held unconstitutional in 1867,²⁴ the court saying that, where the white blood in a person predominated, he was to be considered white. This definition is interesting because it is the only instance found of a court's saying that a person with more than half white blood and the rest Negro should be considered white. In contrast with this is the following sweeping definition laid down in the Tennessee statute: "All Negroes, Mulattoes, Mestizoes,²⁵ and their descendants, having any African blood in their veins, shall be known in this State as 'Persons of Color.'"²⁶ Arkansas also, in its statute separating the races in trains, includes among persons of color all who have "a visible and distinct admixture of African blood."²⁷

In everyday language, a mulatto is any person having both Caucasian and Negro blood. But several States have defined "mulatto" specifically. The Supreme Court of Alabama²⁸ held, in 1850, that a mulatto is the offspring of a Negro and a white person, that the offspring of a white person and a mulatto is not a mulatto; but this definition was enlarged in 1867²⁹ to include anyone descended from Negro ancestors to the third generation inclusive, though one ancestor in each generation be white. It has been seen already that this was recently extended to the fifth generation. The law of Missouri³⁰ defines a mulatto thus: "Every person other than a Negro, any one of whose grandfathers or grandmothers is or shall have been a Negro, although his or her other progenitors, except

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those descending from the Negro, may have been white persons, shall be deemed a mulatto, and every such person who shall have one-fourth or more Negro blood shall in like manner be deemed a mulatto."

Some States have allowed facts other than physical characteristics to be presumptive of race. Thus, it has been held in North Carolina³¹ that, if one was a slave in 1865, it is to be presumed that he was a Negro. The fact that one usually associates with Negroes has been held in the same State proper evidence to go to the jury tending to show that he is a Negro.³² If a woman's first husband was a white man, that fact, in Texas,³³ is admissible evidence tending to show that she is a white woman.

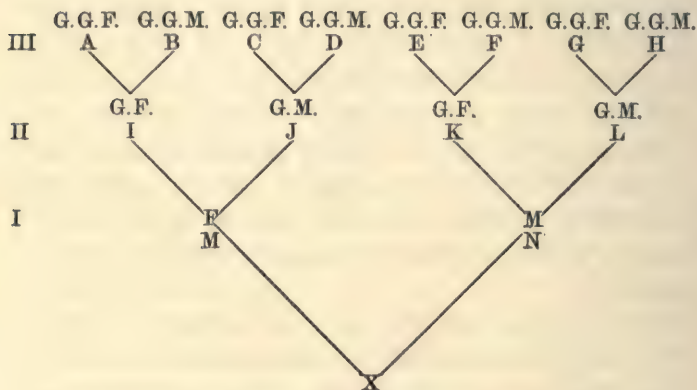
One may ascertain how some of the States define the other races from their laws against miscegenation. Thus, Mississippi, in prohibiting intermarriage between Caucasians and Mongolians, includes one having as much as one-eighth Mongolian blood. Oregon makes its similar law applicable to those having one-fourth or more Chinese or Kanakan³⁴ blood, or more than one-half Indian blood. Thus, three-eighths of Indian blood would not be sufficient to bar a man from intermarriage with a Caucasian, but one-fourth Negro, Chinese, or Kanakan blood would.

The above are the laws which define the races. The interpretation of them is a different question. Some statutes say that one is a person of color—in effect, a Negro—if he is descended from a Negro to the third generation inclusive, though one ancestor in each generation may have been white; others define as a person of color a man who has as much as one-eighth Negro blood; and

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still others, one who has as much as one-fourth Negro blood.

The following diagram will probably clarify these definitions:



Suppose it is desired to ascertain whether the son X is a white person or a Negro. The first generation above him is that of his parents, M and N. If either of them is white and the other a Negro, X has one-half Negro blood and would be considered a Negro everywhere. The second generation is that of his grandparents, I, J, K, and L. If any one of them is a Negro and the other three white, X has one-fourth Negro blood, and would be considered a Negro in every State except possibly Ohio. The third generation is that of his great-grandparents, A, B, C, D, E, F, G, and H. If any one of these eight great-grandparents is a Negro, X has one-eighth Negro blood and would be considered a Negro in every State which defines

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a person of color as one who has one-eighth Negro blood or is descended from a Negro to the third generation inclusive. Suppose, for instance, the great-grandfather A was a Negro and all the rest of the great-grandparents were white. The grandfather I would be half Negro; the father M would be one-fourth Negro; and X would be one-eighth Negro. Thus, though of the fourteen progenitors of X only three had Negro blood, X would nevertheless be considered a Negro.

In the above illustrations only one of the progenitors has been a Negro and his blood has been the only Negro blood introduced into the line. Suppose, however, that there is Negro blood in both branches of the family, as where a mulatto marries a mulatto or a mulatto marries a Negro. One with a mathematical turn of mind may take these three generations and work out the various other combinations which would give X one-half, one-fourth, one-eighth, or any other fraction of Negro blood.

It is safe to say that in practice one is a Negro or is classed with that race if he has the least visible trace of Negro blood in his veins, or even if it is known that there was Negro blood in any one of his progenitors. Miscegenation has never been a bridge upon which one might cross from the Negro race to the Caucasian, though it has been a thoroughfare from the Caucasian to the Negro. Judges and legislators have gone the length of saying that one drop of Negro blood makes a man a Negro, but to be a Caucasian one must be all Caucasian. This shows very clearly that they have not considered Negro blood on a par with Caucasian; else, race affiliation would be determined by predominance of blood. By the latter test, if

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one had more Negro blood than white, he would be considered a Negro; if more white than Negro, a Caucasian. Therefore, at the very threshold of this subject, even in the definitions of terms, one discovers a race distinction. Whether it is a discrimination depends upon what one considers the relative desirability of Caucasian and Negro ancestry.

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Having considered how the law defines that heterogeneous group of people called Negroes, one is brought face to face with the question: What, in actual practice, is the proper name for the black man in America? Is it "Negro?" Is it "colored person?" Is it "Afro-American?" If not one of these, what is it? Among the members of that group, the matter of nomenclature is of more than academic interest. Thus, Rev. J. W. E. Bowen, Professor of Historical Theology at Gamman Seminary, Atlanta, and editor of *The Voice of the Negro*, in 1906, published an article in that paper with the pertinent title, "Who are We?"

The ways of speaking of members of the Negro race are various. In the laws, as has been shown, they are called "Negroes," "Persons of Color," "Colored Persons," "Africans," and "Persons of African Descent"—more often "Persons of Color." By those who would speak dispassionately and scientifically they are called Negroes and Afro-Americans. Those who are anxious not to wound the feelings of that race speak of them as "Colored People" or "Darkies"; while those who would speak contemptuously of them say "Nigger" or "Coon." "Nig-

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ger" is confined largely to the South; "Coon," to the rest of the country. Again, one occasionally finds "Blacks" and "Black Men" in contradistinction to "Whites" and "White Men."

The question of the proper name for persons of African descent was brought into prominence in 1906. In that year a bill was laid before Congress relative to the schools of the City of Washington, which provided that the Board of Education should consist of nine persons, three of whom should be "of the colored race." Representative Thetus W. Sims, of Tennessee, objected to the phrase on the ground that it would include "Indians, Chinese, Japanese, Malays, Sandwich Islanders, or any persons of the colored race," and insisted that "Negroes" or "persons of the Negro race" should be substituted in its place. He wrote to Dr. Booker T. Washington, as one of the leaders of the Negro race, asking his views as to the proper word. The following is part of his reply: ". . . It has been my custom to write and speak of the members of my race as Negroes, and when using the term 'Negro' as a race designation to employ the capital 'N.' To the majority of the people among whom we live I believe this is customary and what is termed in the rhetorics 'good usage.' . . . Rightly or wrongly, all classes have called us Negroes. We cannot escape that if we would. To cast it off would be to separate us, to a certain extent, from our history, and deprive us of much of the inspiration we now have to struggle on and upward. It is to our credit, not to our shame, that we have risen so rapidly, more rapidly than most other peoples, from savage ancestors through slavery to civilization. For my

part, I believe the memory of these facts should be preserved in our name and traditions as it is preserved in the color of our faces. I do not think my people should be ashamed of their history, nor of any name that people choose in good faith to give them." ³⁵

Representative Sims's objection to the phrase "of the colored race" precipitated a discussion throughout the country. The *New York Tribune* ³⁶ made a canvass of a great many prominent Negroes and white persons to ascertain what they thought the Negro should be called. The result of its inquiry is this: An average of eleven Negroes out of twenty desired to be spoken of as Negroes. The other nine spurned the word as "insulting," "contemptuous," "degrading," "vulgar." Two argued for "Afro-American," two for "Negro-American," one for "black man," and one was indifferent so long as he was not called "Nigger." Of the white men interviewed, ten out of thirteen, on an average, preferred the word "Negro." The Negroes made a specially strong plea for capitalizing the word "Negro," saying that it was not fair to accord that distinction to their dwarfish cousins, the Negritos in the Philippines, and to the many savage tribes in Africa and deny it to the black man in America. They were also strongly opposed to the word "Negress" as applied to the women of their race. This, they asserted, is objectionable because of its historical significance. For in times of slavery, "Negress" was the term applied to to a woman slave at an auction, in contradistinction to "buck," which referred to a male slave.

E. A. Johnson, Professor of Law in Shaw University, North Carolina, said: "The term 'Afro-American' is

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suggestive of an attempt to disclaim as far as possible our Negro descent, and casts a slur upon it. It fosters the idea of the inferiority of the race, which is an incorrect notion to instill into the Negro youth, whom we are trying to imbue with self-esteem and self-respect."

Rev. J. W. E. Bowen, to whom reference has already been made, said: "Let the Negroes, instead of bemoaning their lot and fretting because they are Negroes and trying to escape themselves, rise up and wipe away the stain from this word by glorious and resplendent achievements. Good names are not given; they are made."

Rev. H. H. Proctor, pastor of the First Congregational Church, Atlanta, said: "What is needed is not to change the name of the people, but the people of the name. Make the term so honorable that men will consider it an honor to be called a Negro."

Rev. Walter H. Brooks, pastor of the Nineteenth Street Baptist Church, Washington, wrote: "The black people of America have but to augment their efforts in lives of self-elevation and culture, and men will cease to reproach us by any name whatever."

Finally, Charles W. Anderson, Collector of Internal Revenue, New York, said: "I am, therefore, inclined to favor the use of 'Negro,' partly because to drop it would expose me to the charge of being ashamed of my race (and I hate any man who is ashamed of the race from which he sprung), and partly because I know that no name or term can confer or withhold relative rank in this life. All races and men must win equality of rating and status for themselves."

One is safe in concluding that the word "Negro"

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(with the capital "N") will eventually be applied to the black man in America. White people are distinctly in favor of it: what Negroes now object to it do so because of its corrupt form, "Nigger." As the Negro shows his ability to develop into a respectable and useful citizen, contemptuous epithets will be dropped by all save the thoughtless and vicious, and "Negro" will be recognized as the race name.

NOTES

- ¹ "Following the Colour Line," p. 151.
- ² *Ibid.*, p. 151.
- ³ "Up From Slavery," p. 2.
- ⁴ Art. XIII, sec. 11.
- ⁵ Code, 1867, p. 94; Code, 1876, p. 187, sec. 2; Code, 1886, I, p. 56, sec. 2; Code, 1896, I, p. 112, sec. 2.
- ⁶ Laws of Ky., 1865-66, p. 37.
- ⁷ Pub. Gen. Laws of Md., I, art. 27, sec. 305, p. 878.
- ⁸ Laws of Miss., 1865, p. 82.
- ⁹ Pell's Revisal of 1908, II, sec. 3369.
- ¹⁰ Code, 1884, sec. 3291.
- ¹¹ Laws of Tex., special session, 1884, p. 40.
- ¹² Code, 1907, I, p. 218, sec. 2.
- ¹³ Laws of Fla., 1865, p. 30; Code, 1892, pp. 111 and 681; Gen. Stat., 1906, p. 165, sec. 1.
- ¹⁴ Laws of Ga., 1865-66, p. 239.
- ¹⁵ Annotated Stat., 1908, III, sec. 8360.
- ¹⁶ Annotated Stat., 1906, II, sec. 2174.
- ¹⁷ Laws of S. C., 1864-65, p. 271.
- ¹⁸ Compiled Stat., 1895, sec. 3644.
- ¹⁹ Bellinger and Cotton's Code and Stat., II, sec. 5217.
- ²⁰ Laws of Va., 1865-66, p. 84.

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- ²¹ McPherson's Case, 1877, 28 Grat. 939.
- ²² People v. Dean, 1866, 14 Mich. 406.
- ²³ Walker v. Brockway, 1869, 1 Mich. N. P. (Brown) 57.
- ²⁴ Monroe v. Collins, 1867, 17 O. S. 665.
- ²⁵ A mestizo is a person of mixed blood, specially a person of mixed Spanish and American Indian parentage.—Century Dictionary, V, p. 3728.
- ²⁶ Laws of Tenn., 1865–66, p. 63.
- ²⁷ Kirby's Digest, 1904, sec. 6632, p. 1378.
- ²⁸ Thurman v. State, 1850, 18 Ala. 276.
- ²⁹ Code, 1867, p. 94.
- ³⁰ Laws of Mo., 1864, p. 67.
- ³¹ McMillan v. School Com., 1890, 12 S. E. 330; 107 N. C. 609.
- ³² Hopkins v. Bowers, 1892, 16 S. E. 1; 111 N. C. 175.
- ³³ Bell v. State, 1894, 33 Tex. Cr. R. 163.
- ³⁴ A Kanakan is a Hawaiian or Sandwich Islander.—Century Dictionary, IV, p. 3264.
- ³⁵ The Norfolk, Va., *Landmark*, June 13, 1906.
- ³⁶ The New York *Daily Tribune*, June 10, 1906, part IV, p. 2.

CHAPTER III

DEFAMATION TO CALL A WHITE PERSON A NEGRO

THERE are certain words which are so universally considered injurious to a person in his social or business relations if spoken of him that the courts have held that the speaker of such words is liable to an action for slander, and damages are recoverable even though the one of whom the words were spoken does not prove that he suffered any special damage from the words having been spoken of him. The speaking of such words is said to be actionable *per se*. In short, all the world knows that it is injurious to a man to speak such words of him, and the court does not require proof of facts which all the world knows. Such words are (1) those imputing an infamous crime; (2) those disparaging to a person in his trade, business, office, or profession; and (3) those imputing a loathsome disease. Thus, to say that a man is a murderer is to impute to him an infamous crime, and if he brings a suit for slander, it is not necessary for him to prove that he has been damaged by the statement. The result is the same if one says that a person will not pay his debts, because that injures him in his profession or business; or that a man has the leprosy, because that is imputing to him a loathsome disease.

From early times, it has been held to be slander, action-

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able *per se*, to say of a white man that he is a Negro or akin to a Negro. The courts have placed this under the second class—that is, words disparaging to a person in his trade, business, or profession. The first case in point arose in South Carolina¹ in 1791, when the courts held that, if the words were true, the party (the white person) would be deprived of all civil rights, and moreover, would be liable to be tried in all cases, under the “Negro Act,” without the privilege of a trial by jury, and that “any words, therefore, which tended to subject a citizen to such disabilities, were actionable.” In 1818, it was held actionable by a court of the same State to call a white man’s wife a mulatto.² But an Ohio³ court, the same year, held that it was not slander, actionable *per se*, to charge a white man with being akin to a Negro inasmuch as it did not charge any crime or exclude one from society. The only explanation, apparently, of this conflict between the decisions of South Carolina and Ohio is that in the latter State it was not considered as much an insult to impute Negro blood to a white man as in the former. In North Carolina,⁴ in 1860, there was the surprising decision that it was not actionable *per se* to call a white man a free Negro, even though the white man was a minister of the gospel.

The Supreme Court of Louisiana,⁵ in 1888, said: “Under the social habits, customs, and prejudices prevailing in Louisiana, it cannot be disputed that charging a white man with being a Negro is calculated to inflict injury and damage. . . . No one could make such a charge, knowing it to be false, without understanding that its effect would be injurious and without intending to injure.”

In 1900, a Reverend Mr. Upton delivered a temperance

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address near New Orleans. The reporters, desiring to be complimentary, referred to him as a "cultured gentleman." In the transmission of the dispatch by wire to the New Orleans paper, the phrase was, by mistake, changed to "colored gentleman." The *Times-Democrat* of that city, unwilling to refer to a member of the Negro race as a "colored gentleman," changed it to "Negro," and that was the word finally printed in the report. As soon as he learned of the mistake, the editor of the paper duly retracted and apologized. But Mr. Upton, not appeased, brought a suit for libel and recovered fifty dollars damages.⁶

The *News and Courier*, of Charleston, South Carolina, in 1905, in reporting a suit by A. M. Flood against a street car company, referred to Mr. Flood as "colored." The latter brought suit against the newspaper and recovered damages. In the course of its opinion, the court said: "When we think of the radical distinction subsisting between the white man and the black man, it must be apparent that to impute the condition of the Negro to a white man would affect his [the white man's] social status, and, in case anyone publish a white man to be a Negro, it would not only be galling to his pride, but would tend to interfere seriously with the social relation of the white man with his fellow white men; and, to protect the white man from such a publication, it is necessary to bring such charge to an issue quickly."⁷ The court adds that its decision does not violate the Amendments to the Federal Constitution, for these do not refer to the social condition of the two races, but serve rather to give the two races equal civil and political rights. Finally, the court says,

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quoting *People v. Gallagher*: “. . . if one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane.”

Where laws separating the races in railroad trains and street cars are in force, and the duty devolves upon the conductors to assign passengers of the two races to their respective coaches or compartments, it is surprising that they do not more often make the mistakes of assigning bright mulattoes to the white coach and dark-skinned white persons to the colored. There are several instances where the latter mistake has been made. One would not expect a mulatto to resent being assigned to the white coach and nothing would come of it, unless some white passenger recognized him as being a Negro and objected; but one would expect a white person to resent being assigned to the “Jim Crow” compartment.

In Atlanta, in 1904, a certain Mr. Wolfe and his sister boarded a street car and took seats in the part of the car reserved for white passengers. The conductor asked them to move back, and when they asked the reason, he answered that the rear of the car was for colored passengers. The lady asked if he thought they were colored, to which he replied: “Haven’t I seen you in colored company?” Mr. Wolfe demanded an apology, and later brought suit against the company. The court held that the street car company was liable, and that the good faith of the conductor in honestly thinking that they were Negroes would serve only in mitigation of damages. Two judges were of opinion that the company would not be liable if the conductor used “extreme care and caution” to ascertain the race of the passengers. The court held

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that it would take judicial notice of the social status of the two races and of their respective superiority and inferiority, saying: "The question has never heretofore been directly raised in this State as to whether it is an insult to seriously call a white man a Negro or to intimate that a person apparently white is of African descent. We have no hesitation, however, after the most mature consideration of every phase of the question, in declaring our deliberate judgment to be that the wilful assertion or intimation embodied in the declaration now before us constitutes an actionable wrong. We cannot shut our eyes to the facts of which courts are bound to take judicial notice. Certainly every court is presumed to know the habits of the people among which it is held, and their characteristics, as well as to know leading historical events and the law of the land. To recognize inequality as to the civil or political rights belonging to any citizen or class of citizens, or to attempt to fix the social status of any citizen either by legislation or judicial decision, is repugnant to every principle underlying our republican form of government. Nothing is further from our purpose. Under our institutions 'every man is the architect of his own fortune.' Every citizen, white and black, may gain, in every field of endeavor, the recognition his associates may award. That is his right, and his own concern. But the courts can take notice of the architecture without intermeddling with the building of the structure. It is a matter of common knowledge that, viewed from a social standpoint, the Negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic times denies equality. The fact was recognized

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by two of the leaders on opposite sides of the question of slavery, Abraham Lincoln and A. H. Stephens." ⁹

The following is a recent case arising in Kentucky, in which it was held that it is not slander *per se* to call a white person a Negro: A white woman entered a coach set apart for white people. The passengers therein complained that she was a Negro, and the brakeman, on hearing their remarks, asked her to go into the next coach. When, upon reaching the other coach, she found that it was set apart for Negroes, she left the train, which had not yet started from the station. She met the conductor, who, upon hearing her explanation, permitted her to go her journey in the white coach. Later, she brought suit against the railroad company and recovered a judgment for four thousand dollars. Upon appeal, the judgment of the lower court was reversed, the higher court saying: "What race a person belongs to cannot always be determined infallibly from appearances, and mistake must inevitably be made. When a mistake is made, the carrier is not liable in damages simply because a white person was taken for a Negro, or *vice versa*. It is not a legal injury for a white person to be taken for a Negro. It was not contemplated by the statute that the carrier should be an insurer as to the race of its passengers. The carrier is bound to exercise ordinary care in the matter, but if it exercises ordinary care, and is not insulting to the passenger, it is not liable for damages." ¹⁰

Probably the most recent case on the subject is one which arose about two years ago in Virginia. A certain Mrs. Stone boarded a train at Myrtle, Virginia. In spite of her protests, the conductor compelled her to go into

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the "Jim Crow" coach, thinking that she was a Negro. After she had entered the car, a Negro passenger recognized her and said, "Lor', Miss Rosa, this ain't no place for you; you b'long in the cars back yonder." Mrs. Stone rode on to Suffolk, the next station, and left the train. She sued the railroad company for one thousand dollars damages. It appeared that Mrs. Stone was much tanned: this probably caused the conductor to mistake her for a Negro.

It will have been noticed that all the courts which have held it actionable *per se* to call a white person a Negro have been in the Southern States. It is doubtful whether the courts in other sections would take the same view, and even Kentucky, a Southern State, has refused so to do. The attitude of the court depends upon whether it is the consensus of opinion among the people of the community that it is injurious to a white man in his business and social relations to be called a Negro.

The above is clearly another race distinction. Although there are many decisions to the effect that it is actionable *per se* to call a white person a Negro, not one can be found deciding whether it would be so to call a Negro a white person. One event looks, in a measure, in this direction. The city of Asheville, North Carolina, in 1906, contracted with a printer to have a new city directory issued. The time-honored custom of the place was to distinguish white and Negro citizens by means of an asterisk placed before the names of all Negroes. After the directory had been distributed, it was found that asterisks had been placed before the names of two highly respected white citizens, thus indicating that they were

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of Negro lineage. From what has been seen, there is no doubt that this would found an action for libel. The newspaper report says: "On the heels of this suit brought by Mr. Lancaster [one of the white persons], it is said that Henry Pearson is seriously considering bringing suit against the same people because an *asterisk* was not¹¹ placed before his name. Henry is a Negro. In fact he is one of the best-known Negroes in Asheville. He is at present proprietor of the Royal Victoria, a Negro hotel, and complains that he has been the object of many unpleasant jests since the publication of the directory, and likewise inquiries as to just 'when he turned white.' Pearson fears that if the report goes abroad that he is a white man it will damage his hotel, and that the Negroes who make his place headquarters and who pay into Henry's hands many shekels will cease to patronize his hotel, and that his losses will be grievous."¹² This case is unique; whether it has been brought to court is as yet unknown. It is probable that to sustain his action it would be necessary for the Negro to prove special damage to his business; whereas Mr. Lancaster would not have to allege or prove any damage at all. But, save in such a case as the above, it would be hard to imagine a circumstance in which a court would hold that it is injurious to a Negro in his trade, business, office, profession, or in his social relations to be called a white man.

NOTES

¹ Eden v. Legare, 1791, 1 Bays (S. C.) 171.

² Wood v. King, 1818, 1 Nott & McC. (S. C.) 184.

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³ Barrett v. Jarvis, 1823, 1 O. (1 Hammond) 84, note.

⁴ McDowell v. Bowles, 1860, 8 Jones (N. C.) 184.

⁵ Spotarno v. Fourichon, 1888, 40 La. Ann. 423.

⁶ Upton v. Times-Democrat Pub. Co., 1900, 28 So. 970.

⁷ Flood v. *News and Courier* Co., 1905, 50 S. E. 63.

⁸ 93 N. Y. 438 (1883).

⁹ Wolfe v. Ry. Co., 1907, 58 S. E. 899.

¹⁰ So. Ry. Co. v. Thurman, 1906, 90 S. W. 240; 28 Ky. L. Rep. 699; 2 L. R. A. (N. S.) 1108.

¹¹ Italics the writer's.

¹² Raleigh, N. C., *News and Observer*, July 25, 1906.

CHAPTER IV

THE "BLACK LAWS" OF 1865-68

ONE set of race distinctions deserves to be treated by itself. They have long since become obsolete and were, during their existence, in a sense, anomalous; yet they are, perhaps, the most illuminating from a historical point of view of all the race distinctions in the law. They were the result of the statutes that were enacted by the legislatures of the Southern States between 1865 and 1868 for the definition and establishment of the status of the Negro. The War closed in 1865; the Fourteenth Amendment to the Federal Constitution was ratified July 28, 1868; and the Reconstruction régime in the South was not under way till 1868 or later. Therefore, during the interval between the close of the War and the ratification of the Fourteenth Amendment or the beginning of active Reconstruction, the Southern States were free to adopt such measures as they saw fit to establish the relation between the races.

The legislatures faced a new problem, or rather an old problem increased many fold in perplexity. They had to establish the industrial, legal, and political status of 4,000,000 people who had recently been slaves and were now freemen. It must be remembered that when the Southern legislatures convened in 1865 their actions with regard to

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the Negro were not beset by the limitations subsequently fixed by the Federal Government. The first Civil Rights Bill, that of 1866, had not been passed. The Southern States were at liberty to enact such statutes as they thought proper and to draw upon their own experience and that of the free States with regard to free Negroes.

"BLACK LAWS" OF FREE STATES

These statutes of 1865-68 are here called the "Black Laws." This term was first applied to the laws of the border and Northern States passed before and up to the Civil War to fix the position of free persons of color. It is well to make a cursory examination of these laws of the free States, because they are prototypes of many of the statutes enacted by the Southern States while unhampered by Federal legislation. All the States, North as well as South, had previously faced the problem of the free Negro and made laws concerning him. Naturally, therefore, the South, now that all its Negroes were declared free, turned for precedents to the other States which had already had experience with the free Negro.

The following are some of the statutes that had been enacted with regard to free Negroes by States lying outside of what was later the Confederacy:

Maryland,¹ in 1846, denied Negroes, slave or free, the right to testify in cases in which any white person was concerned, though it permitted the testimony of slaves against free Negroes. The Constitution² of 1851 forbade the legislature to pass any law abolishing the relation of master and servant.

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Delaware,³ in 1851, prohibited the immigration of free Negroes from any State except Maryland: moreover, it forbade them to attend camp meetings, except for religious worship under the control of white people, or political gatherings. A law of 1852 provided that no free Negroes should have the right to vote or "to enjoy any other rights of a freeman other than to hold property, or to obtain redress in law and in equity for any injury to his or her person or property."

Missouri,⁴ in 1847, forbade the immigration into the State of any free Negro; enacted that no person should keep a school for the instruction of Negroes in reading and writing; forbade any religious meetings of Negroes unless a justice of the peace, constable, or other officer was present; and declared that schools and religious meetings for free Negroes were "unlawful assemblages."

Ohio, which probably had the most notorious "Black Laws" of any free State, "required colored people to give bonds for good behavior as a condition of residence, excluded them from the schools, denied them the rights of testifying in courts of justice when a white man was party on either side, and subjected them to other unjust and degrading disabilities." ⁵

Indiana,⁶ in 1851, prohibited free Negroes and mulattoes from coming into the State, and fined all persons who employed or encouraged them to remain in the State between ten and five hundred dollars for each offense.⁷ The fines were to be devoted to a fund for the colonization of Negroes.⁸ A law, which was submitted to a special vote and passed by a majority of ninety thousand, prohibited intermarriage between the races, provided for colonization

of Negroes, and made incompetent the testimony of persons having one-eighth or more Negro blood.⁹

Illinois,¹⁰ in 1853, made it a misdemeanor for a Negro to come into the State with the intention of residing there, and provided that persons violating this law should be prosecuted and fined or sold for a time to pay the fine.¹¹

Iowa,¹² in 1851, forbade the immigration of free Negroes,¹³ and provided that free colored persons should not give testimony in cases in which a white man was a party.

Oregon,¹⁴ in 1849, forbade the entrance of Negroes as settlers or inhabitants, the reason being that it would be dangerous to have them associate with the Indians and incite the latter to hostility against white people.

This sketch of the "Black Laws" of some of the free States, incomplete as it is, is sufficient to show how those States regarded free Negroes. First, they tried to keep Negroes out; and, secondly, they subjected those that remained to various disabilities. When the first Civil Rights Bill was before Congress, the strongest opposition to its passage was on the ground that it would compel the free States to repeal these "Black Laws" and allow Negroes to intermarry with whites, attend the same schools, sit on juries, vote, bear firearms,¹⁵ etc. The free Negro constituted a distinct class between the slave and the master, his condition being more nearly that of a slave.

The Southern States had been afraid of the free Negro. He was a sort of irresponsible being, neither bond nor free, who was likely to spread and foster discontent among the slaves. When a slave was emancipated, it was desired that he leave the State forthwith. Thus, the Virginia Constitution¹⁶ of 1850 provided that emancipated

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slaves who remained in the Commonwealth more than twelve months after they became actually free, should forfeit their freedom and be reduced to slavery under such regulations as the law might prescribe. The free Negro was truly between the devil and the deep sea. If he stayed in the State, he would be reënslaved; if he went to a free State, he would be liable to prosecution there for violating the laws against the immigration of free persons of color.

As one turns to the first laws passed by the Southern States after Emancipation, he should keep in mind that these States were only grappling with the old problem of the free Negro, now on a much larger scale, which problem the free States had disposed of already in the manner just seen. As yet, the Southern States had no conception of the Negro as a citizen with inalienable rights to be recognized and protected. For instance, the Constitution of Mississippi¹⁷ of 1832, as amended August 1, 1865, abolished slavery and empowered the legislature to make laws for the protection and security of the persons and property of freedmen, and to guard “them and the State against any evils that may arise from their sudden emancipation.” And the laws of South Carolina,¹⁸ of the same year, provided that, “although such persons [Negroes] are not entitled to social or political equality with white persons,” they might hold property, make contracts, etc. except as hereinafter modified.

THE "BLACK LAWS" OF 1865-68

RESTRICTIONS UPON MOVEMENT OF NEGROES

After 1865 there was comparatively little legislation as to the movement of Negroes from one State to another. It would have been utterly impossible to control the migration of the 4,000,000 Negroes then in the United States. In States where the free Negroes were numbered by only hundreds or even thousands, the entrance or exit of one was a noticeable event. Where, however, Negroes were in the majority, a hundred might have come or gone at once without being noticed. The Constitution of Georgia¹⁹ of 1865 empowered the general assembly to make laws for the regulation or prohibition of the immigration of free persons of color into that State from other places; but the legislature seems not to have used this power.

Two years earlier, in 1863, the legislature of Kentucky²⁰ had declared that it was unlawful for any Negro or mulatto claiming to be free under the Emancipation Proclamation of January 1, 1863, or under any other proclamation by the Government of the United States, to migrate to or remain in the State. Any Negro violating this law was treated as a runaway slave.

A law of South Carolina,²¹ of 1865, provided that no person of color should migrate to or reside in the State unless, within twenty days after his arrival, he entered into a bond with two freeholders as sureties in a penalty of one thousand dollars, conditioned on his good behavior and for his support if he should become unable to support himself. If he should fail to execute the required bond, he had to leave the State within ten days, or be liable to corporal punishment. If, after being so punished, he

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should still remain in the State fifteen days longer, he was to be transported beyond the limits of the State for life "or kept at hard labor, with occasional solitary confinement, for a period not exceeding five years." The same punishment of banishment for life, or confinement and hard labor for a term was prescribed for any person of color coming or being brought into South Carolina after having been convicted of an infamous crime in another State.

That the Southern States believed that the day of the Negro as a laborer was over was evidenced, not only by their efforts to keep Negroes out of the State, but also by the fact that so many of them, during the first years after the War, passed statutes encouraging and offering inducements to foreign immigrants. The movement to bring foreigners into the South is still going on, but it has never met with much success.

Although to-day many places, both in the North and in the South, do not permit Negroes to reside within their borders or even to stay over night, the above are apparently the last instances where attempts to limit the movement of Negroes²² have been made by State legislatures. Most of the States have concluded to allow Negroes to come and go at will, but to fix their status while in the State.

LIMITATIONS UPON NEGROES IN RESPECT TO OCCUPATIONS

From some occupations Negroes were wholly excluded; others, they were permitted to engage in, only after obtaining licenses. The Alabama Code²³ of 1867 provided that no free Negro should be licensed to keep a tavern or to

sell vinous or spirituous liquors. There had been a statute of the same State which declared that a free Negro should not be employed to sell or to assist in the sale of drugs or medicine, under a penalty of one hundred dollars, but this had been repealed in 1866.²⁴

In South Carolina,²⁵ it was unlawful for a Negro either to own a distillery of spirituous liquors or any establishment where they were sold. The violation of this law was a misdemeanor punishable by fine, corporal punishment or hard labor. The law of this State ²⁶ went still further by enacting that no person of color should pursue or practice the art, trade, or business of an artisan, mechanic, or shopkeeper, "or any other trade, employment, or business (besides that of husbandry, or that of a servant under contract for service or labor) on his own account and for his own benefit, or in partnership with a white person, or as agent or servant of any person" until he should have obtained a license. This license was good for one year only. Before granting the license the judge had to be satisfied of the skill, fitness, and good moral character of the applicant. If the latter wished to be a shopkeeper or peddler, the annual license fee was one hundred dollars; if a mechanic, artisan, or a member of any other trade, ten dollars. The judge might revoke the license upon a complaint made to him. Negroes could not practice any mechanical art or trade without showing either that they had served their term of apprenticeship or were then practicing the art or trade. For violation of this rule, the Negro had to pay a fine of double the amount of the license, one-half to go to the informer.

In some States, there was a limitation upon the right

SALE OF FIREARMS AND LIQUOR TO NEGROES

of Negroes to hold land as tenants. A statute of Mississippi ²⁷ in 1865 gave them the right to sue and be sued, to hold property, etc., but declared that the provisions of the statute should not be construed to allow any freeman, free Negro, or mulatto to rent or lease any lands, except in incorporated towns or cities in which places the corporate authorities should control the same. The same statute required every freeman, free Negro, or mulatto to have on January 1, 1866, and annually thereafter, a lawful home and employment with written evidence thereof. If living in an incorporated town, he must have a license from the mayor, authorizing him to do irregular job work—that is, if he was not under some written contract for service; if living outside such a town, he must have a similar license from a member of the board of police of his precinct.

Tennessee,²⁸ on the other hand, went to the length of expressly throwing open all trades to Negroes who complied with the license laws which were applicable to whites and blacks alike.

SALE OF FIREARMS AND LIQUOR TO NEGROES

A fruitful subject of legislation was that relative to the sale of firearms to Negroes. On January 15, 1866, the legislature of Florida ²⁹ enacted a law declaring that it was unlawful for a Negro to own, use, or keep in his possession or control "any bowie-knife, dirk, sword, firearms or ammunition of any kind" unless he had obtained a license from the probate judge of the county. To get the license, he had to present the certificate of two respectable citizens of the county as to the peaceful and

orderly character of the applicant. The violation of this statute was a misdemeanor punishable by the forfeiture to the use of the informer of such firearms and ammunition and by standing in a pillory one hour or by being whipped not over thirty-nine stripes.

In Mississippi ³⁰ the law was that any freedman, free Negro, or mulatto, not in the military service of the United States nor having a specified license, who should keep or carry firearms of any kind or any ammunition, dirk, or bowie-knife should be punished by a fine of not over ten dollars, and all such arms, etc., should be forfeited to the informer. The law further provided that, if any white person lent or gave a freedman, free Negro, or mulatto any firearms, ammunition, dirk, or bowie-knife, such white person should be fined not over fifty dollars, or imprisoned not over thirty days. South Carolina ³¹ did allow a Negro who was the owner of a farm, to keep a "shot-gun or rifle, such as is ordinarily used in hunting, but not a pistol, musket, or other firearm or weapon appropriate for purposes of war."

It has been seen that some States forbade Negroes to make or sell intoxicating liquor. Others went a step further and made it unlawful to sell liquor to Negroes. It is worth noting that one of the early acts of the legislature of Alabama ³² was to repeal such a law. But Kentucky ³³ forbade a coffee-house keeper to sell liquor to free Negroes under penalty of a bond of five hundred dollars. Mississippi ³⁴ made it an offence, punishable by a fine of not over fifty dollars or imprisonment for not more than thirty days, for a white man to sell, give, or lend a Negro any intoxicating liquors, except that a master, mistress, or employer

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might give him spirituous liquors, but not in quantities sufficient to produce intoxication.

These laws against the sale of firearms and liquor to Negroes probably grew out of a fear by the white people of a Negro uprising, such as had occurred during slavery. The South was in such a turmoil immediately after the War that stringent precautionary measures were considered necessary. These statutes have analogies in the present laws of the Western States against the sale of firearms and liquor to Indians. The law of Arizona ³⁵ declares that anyone who sells or gives intoxicating liquor to an Indian is guilty of a misdemeanor, and shall be punished by a fine of between one hundred and three hundred dollars or imprisoned between one and six months, or both. The sale or gift or repair of firearms was added in 1883.³⁶ Idaho ³⁷ has a law very much the same, making the fine, however, not over five hundred dollars or the term of imprisonment not over six months, or both. Dakota Territory,³⁸ in 1865, made it a misdemeanor to sell or give liquor to Indians. Nebraska,³⁹ in 1881, made it an offence punishable by a fine of fifty dollars to sell liquor to them, and in 1891 made it a felony to sell or give liquor to any Indian not a citizen, attaching a fine of not over one thousand dollars or imprisonment in the penitentiary between two and five years. New Mexico ⁴⁰ makes the punishment a fine between twenty and one hundred dollars or imprisonment not over three months. Utah ⁴¹ makes the punishment a fine between ten and one hundred dollars. The law of Oregon ⁴² made it lawful for every *white* male citizen of the age of sixteen to keep and carry certain arms, impliedly denying that right to other races. Washington ⁴³ made the punishment

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for selling or giving liquor to Indians a fine of between twenty-five and one hundred dollars. As late as 1903 one finds in the revised statutes of Maine⁴⁴ a provision that one who sells or gives to an Indian intoxicating liquors forfeits not less than five nor more than twenty dollars, one-half to complainant. It must be clear that the foregoing laws were not passed solely for the moral uplift of the Indian, but quite as much as a protection to white people from drunken Indians. A similar motive must have actuated the Southern States in enacting the laws of 1865-1868, and it has been, at least, one incentive for the present prohibition legislation in the South.

LABOR CONTRACTS OF NEGROES

Another common form of legislation with regard to free Negroes was that relative to their contracts for personal service. A Florida⁴⁵ statute of 1865 required that all contracts with persons of color should be in writing and fully explained to them before two credible witnesses, and that one copy of the contract should be kept by the employer and the other by some judicial officer of the State and county wherein the service was to be performed. Contracts for less than thirty days might be oral. The Negro who failed to perform his contract by wilful disobedience of orders, wanton impudence, or disrespect, failure or refusal to do the work assigned to him, idleness, or abandonment of the premises, was treated as a vagrant. In 1866⁴⁶ the law ceased to be a race distinction when, by a new enactment, it was greatly limited and made applicable to whites and blacks alike.

LABOR CONTRACTS OF NEGROES

The law of Kentucky ⁴⁷ required contracts between white persons and Negroes to be in writing and attested by some white person. The contracts were to be treated as entire, so that, if either party should, without good cause, abandon the contract, the other should be held to have performed his obligation.

Mississippi ⁴⁸ enacted that all contracts for labor with freedmen, free Negroes, or mulattoes for a longer period than one month should be in writing, attested by two disinterested white persons in the county where the labor was to be performed, and read to the Negro by some officer. If the laborer quit without good cause before the expiration of the term, he forfeited his wages for the year up to the time of quitting. That State made it the duty of every civil officer and the option of every other person to arrest and carry back to his employer every Negro laborer who had left, and the person making the arrest was entitled to receive five dollars as a fee and ten cents per mile from the place of arrest to the place of delivery, the same to be paid by the employer and taken out of the wages of the Negro. The Negro might appeal to a justice of the peace who might summarily try the merits of the case. Then, either the master or the servant might appeal to the county court which had power to remand the deserter to the employer or to dispose of him otherwise as it thought right and just, and its decision was final.

In Virginia ⁴⁹ all contracts for service between a white person and a Negro for more than two months had to be in writing, signed by both parties, acknowledged before a justice of the peace, notary public, clerk of the county or corporation court, overseer of the poor, or two or more

credible witnesses in the county or corporation where the work was to be done. And the justice, notary, etc., had to read and explain the contract to the Negro.

Of all the Southern States, South Carolina⁵⁰ went much the furthest into detail as to contracts for service. Persons of color who made contracts for service or labor were to be known as servants, and those with whom they contracted, as masters. Contracts for one month or more must be in writing, attested by one white witness, and approved by the judge of the district court or a magistrate. If the period of service was not mentioned, it was until the twenty-fifth of December next after making the contract. If the wages were not stipulated, they were to be fixed by the district judge or magistrate on application by one of the parties and notice to the other. A Negro, ten years or more of age, having no parent living in the district and not an apprentice, might make a valid contract for a year or less. Contracts must be presented for approval within twenty days. Contracts for one month or more were not binding on the servant unless written and approved. Failure to make such a written contract was a misdemeanor punishable by a fine of from five dollars to fifty dollars. If the servant received only board and clothing, a written contract was unnecessary. The fee for approval ranged between twenty-five cents for a contract of one month or less to one dollar for a contract for one year and one dollar for each year or part of a year in addition, half the fee to be paid by each party.

Labor on farms was minutely regulated. Hours of labor, except on Sundays, were from sunrise to sunset, with a reasonable interval for breakfast and dinner.

LABOR CONTRACTS OF NEGROES

Servants must "rise at the dawn in the morning, feed, water, and care for the animals on the farm, do the usual and needful work about the premises, prepare their meals for the day, if required by the master, and begin the farm work or other work by sunrise." They must be careful of all the animals and property of their masters, and especially of the animals and implements used by them; must prevent them from injury by others. They were answerable for all property lost, destroyed, or injured by their negligence, dishonesty, or bad faith.

All lost time, not occasioned by the master, and all losses caused by neglect of duty might be deducted from the wages of the servant. Food, nursing, and other necessities for the servant, while absent from work on account of sickness or other cause, might also be deducted. Servants must be quiet and orderly in their quarters, at their work, and on the premises. They must extinguish their lights and fires, and retire to rest at seasonable hours. Work at night and out-door work in bad weather was not to be exacted except in cases of necessity.

Servants were not to be kept at home on Sundays unless to take care of the premises or animals, for work of daily necessity, or on unusual occasions; and then only so many as were necessary to do the work. Sunday work must be done by them in turn, except in cases of sickness or disability, when the work might be assigned out of order. Those away on Sunday must be back by sunset.

Masters might give servants tasks, and might require them to rate themselves as full hands, three-quarters, half, or one-quarter in order to determine the task. If the serv-

ant complained of the task, the district judge or magistrate might reduce or increase it.

Visitors of servants could not be invited or allowed by the servants to come on the premises of the master without his express consent, nor could servants be absent from the premises without such permission.

If the servant left his employment without good cause, he forfeited all the wages due him. He must obey all lawful orders of the master or his agent, and "be honest, truthful, sober, civil, and diligent in his business." The master might moderately correct servants under eighteen years of age. He was not liable to pay for any additional services of a servant, if they were necessary, except by express agreement.

The master might discharge the servant for: (1) wilful disobedience of the lawful order of himself or his agent; (2) habitual negligence or indolence in business; (3) drunkenness, grossly immoral or illegal conduct; (4) want of respect and courtesy to himself, his family, guests, or agents; (5) or for prolonged absence from the premises, or absence on two or more occasions without permission. Or, if the master preferred, he might report the servant to the district judge or magistrate, who had power to inflict suitable corporal punishment or impose a fine, and remand him to work; the fine to be deducted from the wages, if not paid. These were the means by which the judge or magistrate might compel the servant to perform his contract.

The master was not liable to third persons for the voluntary trespasses, torts, and misdemeanors of his servants. Nor was he liable for any contract of his servant unless

LABOR CONTRACTS OF NEGROES

made with the master's authority, nor for any acts of the servant unless done within the scope of his authority or in the course of his employment. It was the master's duty to protect his servant from violence at the hands of others and to aid him in getting redress for injuries.

For a person to deprive the master of the services of his servant, knowing him to be such, by enticing him away, harboring him, detaining him, beating, confining, disabling, or in any way injuring him was punishable by a fine of from twenty dollars to two hundred dollars, and imprisonment or hard labor for not over sixty days. In addition, the master might recover damages for loss of such services.

The master had the right to command the servant to aid him in the defence of his own person, family, premises, or property. He did not have to furnish medicine or medical assistance to the servant unless he especially agreed to do so.

The master might inform a prospective employer of the character of a Negro who had been in his service, and this was a privileged communication unless falsely and maliciously made. The servant could not make a new contract without producing the discharge of his former master or of the district judge or magistrate.

If the master was convicted of a felony or if he managed or controlled his servants so as to make them a nuisance to the neighborhood, any white freeholder might complain to the district judge and have the contract annulled, and the master could not employ any colored servant within two years.

A servant had the right to leave his master's service for :
(1) an insufficient supply of food ; (2) an unauthorized

battery upon his person or upon a member of his family, not committed in the defence of the person, family, guest, or agent of the master; (3) invasion by the master of the conjugal rights of the servant; (4) or failure by the master to pay wages when due. In any one of the above cases, the servant might collect his wages due him at the time of his departure.

If the master died, the contract—contrary to the usual rule of law—was not terminated without the assent of the servant. His wages up to one year took preference over other debts of the master. If the servant was wrongfully discharged, he could collect wages for the whole period of the contract. Upon the servant's discharge or the expiration of his term of service, the master must furnish him a certificate of discharge, and upon his request, a certificate of character. If the servant forged or altered this certificate—as by falsely claiming that he had been in a certain previous service—he was guilty of a misdemeanor, punishable by a fine of not over one hundred dollars. All disputes as to alleged wrongful discharges or departures were to be heard by the district judge, who could compel the master to take back the servant or forfeit a penalty of a fine of twenty dollars; or compel the servant to return to his master under pain of corporal punishment or fine.

A servant was not liable for contracts made by the express authority of his master. Nor was he liable civilly or criminally for any act done by the command of his master in defence of his master's person, family, guest, servant, premises, or property.

Negroes employed as house servants had, at "all hours of the day and night, and on all days of the week," to

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answer promptly all calls and execute all lawful orders and commands of the master's family. They had to be especially civil and polite to their master, his family, and guests, for which they in turn should "receive gentle and kind treatment."

The statute provided for a regular form of contract between master and servant, which was understood to include all of the above stipulations unless otherwise provided.

APPRENTICE LAWS

The early legislatures also made detailed apprentice laws. Although it is scarcely open to argument that, in making such laws, they did not have in mind primarily Negroes, still many of the statutes made no mention of race, and, therefore, cannot be properly discussed here. Thus, Alabama ⁵¹ had a long statute on apprentices, but the only reference to the Negro was the rule that, if the minor be a child of a freedman, the former owner of the child should have the preference of apprenticing him, if a suitable person.

In Kentucky,⁵² if the apprentice was white, the master must teach him reading, writing, and common arithmetic up to and including the "Rule of Three"; if a Negro, the master must pay at the end of the apprenticeship fifty dollars to a girl and one hundred dollars to a boy, but if the master should teach the apprentice to read and write, he was not bound to pay any money. In Kentucky, also, in apprenticing Negroes, preference was given to their former owners, if the latter were suitable persons.

Mississippi ⁵³ had an elaborate apprentice law which

related only to freedmen, free Negroes, and mulattoes. The sheriffs, justices of the peace, and other civil officers of the county had to report to the probate court semiannually, in January and July, the names of all freedmen, free Negroes, and mulattoes, under the age of eighteen, who were orphans or whose parents were unable or unwilling to support them. It was the duty of the court, thereupon, to order the apprenticing of such minors, preference being given to their former masters if suitable persons. The master had to furnish a bond payable to the State conditioned upon his furnishing the minor with sufficient food and clothing, treating him humanely, giving him medical attention when sick, and, if the minor was under fifteen, teaching him or having him taught to read and write. Males were bound till they were twenty-one; females, till they were eighteen. The master could inflict moderate corporal chastisement as a father or guardian might do; but in no case could he inflict cruel or inhuman punishment.

If the apprentice ran away, the master might pursue him and bring him before a justice of the peace who could remand him to the service of his master. If the apprentice refused to return, he might be put into jail until the next term of the court, when his case would be investigated. If it was found that he left without cause, he could be punished like a hired freedman; but if he had a good cause, the court might discharge him and enter judgment against his master for not over one hundred dollars to be paid to the apprentice. Anyone enticing an apprentice away from his master, knowingly employing him, furnishing him food or clothing, or giving or selling him liquor without the master's consent was guilty of a high misdemeanor.

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If the master wished to get rid of the apprentice, he might go before the probate court, which could cancel his bond, and re-apprentice the minor. If the master died, the court in re-apprenticing would give preference to the widow or other member of the family of the deceased. If the master wished to move to another State and take his apprentice with him, he had to execute a bond conditioned upon his compliance with the apprentice laws of the State to which he was going. Any parent of a free Negro or mulatto might apprentice his minor child, and if the age could not be fixed by record testimony, the court fixed it.

The only race distinction made by North Carolina⁵⁴ was the law that no white child should be bound to a colored master or mistress, and this came in 1874—long after the period here considered.

The apprentice laws of South Carolina⁵⁵ which applied only to Negroes were almost as elaborate as those of Mississippi. A child over two years of age, born of a colored parent, might be bound as an apprentice to any respectable white or colored person; if a male, till he was twenty-one; if a female, till she was eighteen. Illegitimate children might be bound out by their mother. If the child had no parent in the district; or if his parents were paupers, or unable to support him, or were not teaching him the habits of industry and honesty, or were of a notoriously bad character or vagrants, or if either of them had been convicted of an infamous crime, he might be apprenticed by the district judge or by a magistrate. Males of twelve and females of ten had to sign the contract of apprenticeship and were bound thereby; but their refusal to sign would not affect the validity of the instrument. If the

apprenticeship was voluntary, the contract had to be under seal, signed by the master, parent, and apprentice, attested by two credible witnesses, and approved by the district judge or magistrate. One copy of the contract was kept by the master, another, filed in the office of the clerk of court. The master had to pay three dollars for the approval of the contract by the district judge or magistrate.

Other duties devolving upon the master were to teach the apprentice the business of husbandry or some other useful trade or business specified in the contract; to furnish him wholesome food and suitable clothing; to teach him habits of industry, honesty, and morality; to govern and treat him with humanity; and if there was a colored school within convenient distance, to send him to school as much as six weeks of each year after he was ten years of age. The teacher of such school must have the license of the district judge to establish it.

The master could inflict moderate chastisement, impose reasonable restraint on the apprentice, and bring him back if he ran away. If the master neglected his duty or subjected the apprentice to the danger of moral contamination, the district judge might dissolve the relation of master and apprentice. All cases of dispute between master and apprentice were to be tried before a magistrate, who had the power to punish the party found to be at fault. If the judge ordered the apprentice discharged for immoderate correction or unlawful restraint, the master might be indicted and punished by a fine of not over fifty dollars or imprisonment of thirty days. In addition, the apprentice had an action for damages.

After the expiration of the term of service, the appren-

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tice was entitled to not over sixty dollars from his master. To the apprentice also applied the provisions for the servant under contract, which have been considered, except that the master was bound to furnish him medical aid, as he did not have to do in the case of the servant. And for apprentices also, as in the case of servants, there was a regular form of contract which was understood to contain all the above stipulations.

In Delaware,⁵⁶ not a Southern State, but much like the Southern States in its dealings with the Negro, in its code of 1852 as amended in 1893, is this belated statute: "Any two justices of the peace, on receiving information of any Negro or mulatto child in their county, having no parents in this State, or who, being under the age of fifteen years, have no parent able to maintain them, or who do not bring them up to industry and stable employment, shall issue process to a constable commanding him to bring such child before them at a specified time and place, and to give notice thereof to the parents, if any, and shall thereupon inquire into their circumstances; and if it appear to be a proper case for binding such child, they shall proceed to bind said child as a servant, unless they shall deem the binding, under the circumstances, to be inexpedient."

The constitutionality of these apprentice laws was tested as early as 1867.⁵⁷ A Negro girl, who had been a slave in Maryland and had been freed by the Constitution of that State, November 1, 1864, was, two days later, apprenticed by her mother to her former master. The laws governing Negro apprentices differed from those governing white apprentices in that the master did not obligate himself to teach the Negro apprentice reading, writing, and

arithmetic, and retained the right to transmit the apprenticeship anywhere in the county. Upon a petition for a writ of *habeas corpus*, the Federal court held that the Maryland law resulted in practical slavery and, hence, violated the Thirteenth Amendment and the Civil Rights Bill of 1866.

The other Southern States had apprenticeship laws, possibly as detailed as the ones here considered, but they cannot be treated of here because they applied to white and colored children alike.

VAGRANCY LAWS

The present vagrancy laws of the South have been much criticised for the reason, as it is alleged, that they are used to get recruits for chain gangs and convict camps, and that Negro vagrants are taken up while white vagrants go scotfree. Be that as it may, the fault lies with the officers, not with the law, for the law, on its face, applies to both races equally. But the first years after the War did witness the enactment of vagrancy laws which had special application to Negroes. Some States passed vagrancy laws which made no race distinction, but, as in the case of apprentices, it is beyond dispute that they were aimed especially at the Negro.

The following persons South Carolina⁵⁸ classed as vagrants: (1) all persons who have not some fixed and known place of abode, and some lawful and reputable employment; (2) those who have not some visible and known means of a fair, honest, and reputable livelihood; (3) all common prostitutes; (4) those who are found wandering from place to place, vending, bartering, or peddling any articles or

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commodities without a license; (5) all common gamblers; (6) persons who lead idle or disorderly lives, or keep or frequent disorderly or disreputable houses or places; (7) those who, not having sufficient means of support, are able to work and do not work; (8) those who (whether or not they own lands, or are lessees or mechanics) do not provide a reasonable and proper maintenance for themselves and families; (9) those who are engaged in representing publicly or privately, for fee or reward, without license, any tragedy, interlude, comedy, farce, play, or other similar entertainment, exhibition of the circus, sleight-of-hand, waxworks, or the like; (10) those who, for private gain, without license, give any concert or musical entertainment, of any description; (11) fortune tellers; (12) sturdy beggars; (13) common drunkards; (14) those who hunt game of any description, or fish on the land of others or frequent the premises, contrary to the will of the occupants. That the South Carolina legislature had the Negro primarily in mind is shown by the fact that this section is included in the act "to establish and regulate the domestic relations of persons of color and to amend the law in relation to paupers and vagrancy."

Mississippi⁵⁹ had a vagrancy list almost as extensive as that above with the addition that any freedmen, free Negroes, or mulattoes over eighteen years of age, found on the second Monday in January, 1866, or thereafter, with no lawful employment or business, or found unlawfully assembling themselves together in the day or night time, and white persons "so assembling with freedmen, free Negroes, or mulattoes . . . on terms of equality, or living in adultery or fornication with a freedwoman, free Negro,

or mulatto," should be considered vagrants. The white man so convicted was punishable by a fine of two hundred dollars and imprisonment for not more than six months; the Negro, by a fine of fifty dollars and imprisonment for not over ten days. A Negro unable to pay his fine might be hired out for the purpose, but no such provision applied to whites.

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Another perplexing problem that faced the Southern legislatures was how to meet the needs of the paupers, white and Negro. Much of the property of the white people had been swept away entirely or had greatly deteriorated in value as a result of the War. Few of the Negroes, to be sure, had property to lose, but what was worse, they had lost their right to look to the white people for sustenance. Many of them were unable to support themselves, and the white people could not help them. The legislatures, therefore, adopted the plan of levying a tax upon each race for the support of its own indigents. South Carolina and Mississippi again took the lead.

In South Carolina,⁶⁰ when a person of color was unable to earn his support and was likely to become a public charge, the father and grandfathers, mother and grandmothers, child and grandchildren, brother and sister of such a person should each according to ability contribute for the support of his or her relative. In each judicial district there was a "Board of Relief of Indigent Persons of Color," consisting of from four to eight magistrates, each magistrate looking after the indigent Negroes in his precinct. There was a fund, composed of fees paid for the

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approval of contracts for service, instruments of apprenticeship, licenses, fines, penalties, forfeitures, and wages of convicts, for the relief of indigent Negroes. If this fund was insufficient, the board might impose a tax of one dollar upon all male persons of color between eighteen and fifty, and fifty cents upon each female between eighteen and forty-five. This tax had to be paid on the day fixed or the person rendered himself liable to pay a double tax. It was the duty of every occupant of premises to make a report to the magistrate of any indigent colored person thereon, and the magistrate had to make inquiry into the condition and wants of such Negroes so reported. Moreover, the magistrate had to make a semiannual report of the condition of such Negroes to the chairman of the Board of Relief. The machinery for taking care of Negro paupers was worked out in more detail than it would be profitable to go into here.

South Carolina made also these very humane provisions: Where, upon any farm or lands, there were, on December 21, 1865, persons of color who were formerly the slaves of the owner, lessee, or occupant of the farm or lands present there on November 10, 1865, and had been there six months previous, helpless, either from old age, infancy, disease, or other cause, and unable to maintain themselves and had no parent or other relative able to maintain them or to provide other houses or quarters, it was not lawful for the present or any subsequent owner, lessee, or occupant before January 1, 1867, to evict such helpless person of color, under penalty of a fine of fifty dollars, or imprisonment of one month.

The law of Mississippi ⁶¹ provided that the same liabili-

ties should rest on Negroes to support their indigents as upon white persons to support theirs. It levied a tax of one dollar upon every freedman, free Negro, or mulatto between eighteen and sixty to go into the Freedmen's Pauper Fund. If a Negro refused to pay the tax, he might be arrested and hired out till he had worked out the amount.

The Southern States between 1865 and 1868 passed many statutes relative to the marital relations of Negroes and to their right to testify in court. But these statutes are to be discussed in later chapters. It may be said, however, in passing, that the district judge, so often referred to in connection with the South Carolina laws, was a special officer whose main duty was to preside over cases and disputes to which Negroes were parties.

This chapter has been confined to the early industrial distinctions between the races—that is, to those laws which related to the rights of the Negro as a bread-winner. These are the distinctions brought forward by those who believed in radical reconstruction measures in the South, as an argument for their position. It was urged by such that, unless Congress stepped in and took a hand, the Southern States would reënslave the Negro: they pointed particularly to the laws of Mississippi and South Carolina in confirmation of their contention. And there was apparently good ground for such a view. The laws providing that colored laborers should be called servants and their employers masters, that they should arise at a certain time and work so many hours per day, that they could not leave the premises or receive visitors without the master's consent, and the like, sounded very much like prescribing the duties and privileges of a

slave. But, on the other hand, many of the requirements were for the protection of the Negro. Such, for instance, were the statutes requiring contracts for service to be in writing and the terms of them explained to the Negro; that helpless ex-slaves should not be evicted from their old homes within two years from January 1, 1865; that Negro paupers should be cared for; and that the master must teach his apprentice to read and write, must give him good food and clothing, and treat him humanely.

A discussion, however, of the merits of these early laws is out of place here. But it is only fair to remember, in reading them, that the Southern legislatures were, in many instances, only following precedents that had been set by the free States in dealing with free Negroes, and that the States, either Northern or Southern, had not yet looked upon the Negro as a citizen with the rights guaranteed him by the amended Federal Constitution. Industrial conditions in the South were so demoralized by the War and Emancipation that the legislatures considered it imperative upon them to take immediate and positive steps to establish an industrial relation between the races.

Practically all of these laws were repealed or became dead letters as soon as the Fourteenth Amendment was passed or, at least, as soon as the government of the Southern States went into the hands of the Reconstructionists. But they are still interesting historically as having furnished an argument for the radical régime of Reconstruction which Thaddeus Stevens and his supporters inaugurated and advanced.

NOTES

¹ Laws of Md., 1846-47, chap. 27.

² Art. III, sec. 43.

³ Revised Stat., 1852, pp. 143-46.

⁴ Laws of Mo., 1847, pp. 103-04.

⁵ Wilson: "The Rise and Fall of the Slave Power in America," II, p. 170.

⁶ Const., 1852, Art. XIII.

⁷ This was held to be in violation of the Federal Constitution in *Smith v. Moody*, 1866, 26 Ind. 299, on the ground that the Negro had become a citizen and, as such, entitled to migrate from one State into another.

⁸ The section of the statute which related to colonization was repealed in 1865 because the legislature thought that those authorized to act under the statute were not rendering any adequate service to the State. Laws of Ind., 1865, p. 63.

⁹ Wilson: "The Rise and Fall of the Slave Power in America," II, pp. 183-85.

¹⁰ Pub. Laws of Ill., 1853, p. 57.

¹¹ Repealed Feb. 7, 1865. Pub. Laws of Ill., 1865, p. 105.

¹² Laws of Ia., 1850-51, pp. 172-73.

¹³ Repealed in 1864. Laws of Ia., 1864, p. 6.

¹⁴ Gen. Laws of Ore., 1850-51, pp. 181-82.

¹⁵ Flack: "The Adoption of the Fourteenth Amendment," 1908, John Hopkins Press, pp. 20, *et seq.*

¹⁶ Art. IV, sec. 19.

¹⁷ Art. VIII.

¹⁸ Laws of S. C., 1865, p. 271.

¹⁹ Art. II, sec. 5, par. 1.

²⁰ Laws of Ky., 1863, p. 366.

²¹ Laws of S. C., 1865, p. 276.

NOTES

²² In three places, at least, in North Carolina a Negro is not allowed to stay over night. They are Canton (Haywood County), Mitchell, and Madison Counties, all in the western part of the State. Negroes may work unmolested all day, but, if they linger after nightfall, they are reminded that it would not be healthy for them to remain during the night. The Raleigh, N. C., *News and Observer*, Aug. 19, 1906. Also see *The Independent*, vol. 59, p. 139, for a similar situation in Syracuse, Ohio, and Baker: "Following the Colour Line," pp. 71-73 and 126.

²³ Code, 1867, sec. 1237.

²⁴ Code, 1867, sec. 1233; Laws of Ala., 1865-66, p. 105.

²⁵ Laws of S. C., 1865, p. 275.

²⁶ *Ibid.*, p. 299.

²⁷ Laws of Miss., 1865, pp. 82-83.

²⁸ Laws of Tenn., 1865, p. 23.

²⁹ Laws of Fla., 1865, pp. 25 and 37.

³⁰ Laws of Miss., 1865, pp. 165-66.

³¹ Laws of S. C., 1865, p. 275.

³² Laws of Ala., 1865-66, p. 55.

³³ Laws of Ky., 1865-66, pp. 68-69.

³⁴ Laws of Miss., 1865, pp. 165-66.

³⁵ Laws of Ariz., 1867, p. 19; 1873, p. 78.

³⁶ *Ibid.*, 1883, p. 114.

³⁷ Laws of Idaho, 1879, p. 31.

³⁸ Laws of Dak. Ty., 1864-65, p. 192.

³⁹ Laws of Neb., 1881, p. 274; 1891, p. 267.

⁴⁰ Gen. Laws of N. M., 1880, p. 427; act 1876, chap. 28.

⁴¹ Laws of Utah, 1882, p. 32.

⁴² Laws of Ore., 1868, pp. 18-19.

⁴³ Laws of Wash., 1867, pp. 95-96.

⁴⁴ Revised Stat., 1903, p. 202.

⁴⁵ Laws of Fla., 1865, pp. 32-33.

- ⁴⁶ *Ibid.*, 1866, p. 22.
- ⁴⁷ Laws of Ky., 1865-66, p. 52.
- ⁴⁸ Laws of Miss., 1865, pp. 83-84.
- ⁴⁹ Laws of Va., 1865-66, p. 83; repealed in 1871—Laws of Va., 1870-71, p. 147.
- ⁵⁰ Laws of S. C., 1865, pp. 295-299 and 275-76.
- ⁵¹ Laws of Ala., 1865-66, pp. 128-31.
- ⁵² Laws of Ky., 1865-66, pp. 49-50.
- ⁵³ Laws of Miss., 1865, pp. 86-90. This was repealed Feb. 1, 1867—Laws of Miss., 1866-67, pp. 443-44.
- ⁵⁴ Laws of N. C., 1874-75, p. 92.
- ⁵⁵ Laws of S. C., 1865, pp. 292-95.
- ⁵⁶ Revised Code, 1852, as amended in 1893, p. 609.
- ⁵⁷ *In re Turner*, 1867, Fed. Case No. 14,247.
- ⁵⁸ Laws of S. C., 1865, pp. 303-04.
- ⁵⁹ Laws of Miss., 1865, pp. 90-93.
- ⁶⁰ Laws of S. C., 1865, pp. 299-303.
- ⁶¹ Laws of Miss., 1865, pp. 92-93.

CHAPTER V

RECONSTRUCTION OF MARITAL RELATIONS OF NEGROES

ONE of the perplexing problems that arose out of Emancipation was the fixing of the marital relations among Negroes. It is generally known that the marriage ties between slaves were loose and their domestic relations irregular. In some instances, slave marriages were solemnized according to legal requirements, by either a white clergyman or other proper officer of the law; in others, there was the common law marriage—that is, the parties lived together as husband and wife under a simple, unrecorded agreement between themselves; in still other instances, there was deplorable promiscuity.

When the Negro was made a citizen, it became necessary at once to settle his marital relations. If the usual slave marriages were not recognized as legal, then the offspring of such unions were bastards with the usual disqualifications of that class, among which is their partial incapacity to inherit property. In order to secure to Negroes the rights of heirs, it was necessary to legalize slave marriages, at least to the extent of giving to the children of such marriages the right of inheritance. This was accomplished in one of three ways. Some States required the emancipated slaves to be remarried in order to legitimate their offspring; others required them to appear before an

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officer, declare their desire to continue to live together, and get a certificate; others still, and these were in the majority, passed statutes legalizing all slave marriages. A few States did not adopt any one of these three methods but left it to the courts to recognize the legality of such marriages as cases arose.

REMARRIAGES

Among the States which adopted the method of remarrying was Florida,¹ which, by a law of 1866, required all colored persons living together as husband and wife, who had not been legally married, and who wished to continue so to live together, to be married within nine months from the passage of the statute on January 11th. If they failed to be married but continued to live together, they were punished as guilty of fornication and adultery. By the second marriage, their children were legitimated. The law made it incumbent upon the clerk of the court, upon application by the parties and a tender of the required fee, to enter a certificate of marriage upon his register. Anyone practicing fraud upon Negroes by pretending to perform the marriage ceremony without authority to do so was guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars, imprisonment not over six months, or might be sentenced to stand in a pillory not over one hour. After the expiration of the nine months named in the statute, the marriage requirements for white and colored persons were the same. This statute of 1866² was amended, on December 14, of the same year, to the effect that, if persons of color had lived together as husband and wife and

REMARRIAGES

had recognized each other as such, they were to be considered married and their children to be legitimate. Thus, the necessity of a remarriage was obviated. The amendment was added apparently because of the great number of indictments for adultery against those who had not complied with the law of January 11th.

The Georgia ³ Constitution of 1865 directed the General Assembly at its next session to pass a law to legalize the existing slave marriages and to provide for the contracting and solemnizing of future marriages and, in connection with this, to define and regulate the Negro's right to devise and inherit property. The General Assembly ⁴ responded in 1866 by enacting a statute by which persons of color then living together as husband and wife were declared to be so. If the man had two reputed wives or the wife two reputed husbands, he or she must select one of the two as wife or husband, with her or his consent, and have the ceremony of marriage performed. If they continued to cohabit without making this choice, they were guilty of fornication and adultery. It was not enough to make the selection and live faithful to the one chosen; the marriage ceremony was a requisite.⁵ Unless there were two reputed husbands or wives, the ceremony was not necessary.⁶ By the same act ⁷ the children of slave marriages were legitimated, and Negro ministers were given a similar right to perform marriage ceremonies for Negroes as white ministers had for both races.

Missouri,⁸ in 1865, required all persons of color claiming to be married and wishing to continue in that relation to appear before some one authorized to perform the ceremony and be joined in marriage.

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The same year, South Carolina⁹ passed a statute of ninety-nine sections relative to persons of color, eleven of which concerned their marital relations. This statute established the relation of husband and wife between persons of color, and declared that those then living as such were husband and wife. If a man had two or more reputed wives or a woman two or more reputed husbands, he or she must choose one of them by April 1, 1866, and be remarried. Children born before the enactment of this law were declared to be the legitimate offspring of their mother, and of their putative father also if they were acknowledged by him. Thereafter, Negroes must be married as white people were—by a clergyman, judge, magistrate, or other judicial officer. The husband who abandoned his wife or the wife who abandoned her husband, might be bound out from year to year until he or she was willing to resume conjugal relations. An abandoned wife was free to make a contract for service. South Carolina has been apparently the only State to provide for the children of white fathers and Negro mothers. A law¹⁰ of 1872 declared that such children might inherit from their father if he did not marry another woman but continued to live with their mother.

CERTIFICATES OF MARRIAGE

Kentucky, Louisiana, and Maryland provided for the marriage of former slaves by the second method enumerated above, the granting of certificates. The Kentucky law¹¹ declared that all colored persons who had been living together as husband and wife and who continued to do so should be regarded as legally married and their children

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legitimate. But the man and woman must appear before the clerk of the county court and declare that they had been living and wished to continue to live as husband and wife. Upon payment of fifty cents, the clerk recorded the declaration, and for twenty-five cents more issued a certificate thereof to the parties. It was not a sufficient compliance with the statute for the parties to continue to live together without appearing before the clerk of the court.¹²

An interesting case ¹³ which arose under this Kentucky statute was as follows: A Negro woman, an ex-slave and living as the wife of another ex-slave, made her promissory note between the time of her emancipation and the date of this law. Under the provision of the statute, the man and woman appeared before the clerk of the court and obtained a marriage certificate. Later, she was sued on the note and pleaded coverture. At that time a married woman could not make a valid contract in her own name. The court held the plea bad, being of opinion that, as between the parties to the marriage, the statute validated their union from the beginning, but as to third parties, the woman was still single and so capable of making a valid contract.

In 1895, the same court¹⁴ held that, if a Negro man and woman lived together while slaves as husband and wife, a customary marriage was established, the court saying in its opinion: "Since the passage of the Act of February, 1866, . . . the general tendency of the decisions of this court has been to give that Act of 1866 a liberal construction with a view to effectuate its clearly defined purpose." And a late statute¹⁵ of 1898 further modified the law of 1866 by declaring that the children of above marriages might inherit

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property. If there was a subsequent marriage and children born of it, the slave children shared with them *pro rata*.

A statute of Louisiana,¹⁶ in 1868, legalized all private or religious marriages, provided that the parties, within two years, made a declaration of their marriage before a notary public or other competent officer, giving the date of the marriage and the number and ages of the children. Though the statute did not mention Negroes, it must have been passed for their benefit.

In 1873, the following case ¹⁷ came before the Louisiana court: A Negro's parents, who had lived together as husband and wife, died before Emancipation. The majority of the court held that, if they had lived till after Emancipation, their children would have been capable of inheriting their property, but, since they died before Emancipation, their marriage was never legalized, and their offspring could not so inherit. The dissenting opinion was that, since the slaves had done all they could to be legally married, they should be recognized as married and their children should be legitimated.

Maryland,¹⁸ in 1867, confirmed and made valid all previous marriages between colored persons, but required them to prove before a justice of the peace that they had been so married; and a certificate to that effect had to be filed with the clerk of the court. Thereafter, colored persons must secure licenses and be married in the same manner as white people.

SLAVE MARRIAGES DECLARED LEGAL BY STATUTE

SLAVE MARRIAGES DECLARED LEGAL BY STATUTE

The last of the three methods of reconstructing the domestic relations of former slaves was by declaring slave marriages legal by statute. On September 29, 1866, the Constitutional Convention of Alabama, which adopted an ordinance prohibiting slavery, also enacted ¹⁹ that all marriages between freedmen and freedwomen, whether during slavery or after, solemnized by one having or claiming to have the authority, should be valid, if the parties were still living together. It was subsequently held that, under this act, the woman had a right of dower, although the man had abandoned her and married another woman within a month after such act was passed.²⁰ In 1870, the Supreme Court of the State held that the children of slave marriages were not bastards, that by the elevation of their parents to citizenship, their heritable blood was restored.²¹

Arkansas,²² in 1866, legalized marriages of all persons of color who then lived together as husband and wife and made their children legitimate, but provided that thereafter all marriages of persons of color must be recorded. The same year Tennessee ²³ passed a similar statute.

The Constitution ²⁴ of Texas of 1869 declared that all persons should be considered legally married who in slavery lived as husband and wife and after Emancipation either continued to live together till one died or were living together at the time of the adoption of the Constitution. Such a marriage completed by cohabitation after Emancipation was valid, though the parties separated within five months and were not living together at the time of the adoption of the Constitution.²⁵

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The law of Virginia²⁶ provided that persons of color living as husband and wife on February 27, 1866, whether or not any ceremony had been performed, should be considered as lawfully married and their children legitimate. If they had separated prior to that date the children of the woman, if recognized by the man to be his, were nevertheless legitimate. West Virginia²⁷ had practically the same law, except the latter clause about recognition by the father.

Illinois,²⁸ as late as 1891, passed a statute to legalize slave marriages and legitimate the children thereof. But this law did not apply to a voidable slave marriage in another State, disaffirmed by a subsequent legal marriage before the enactment of the statute.²⁹ A similar decision under a similar statute was rendered in Ohio³⁰ in 1883. These decisions would indicate that a slave marriage was valid only if there was no subsequent marriage of either party to a third person. In 1876, New York³¹ recognized as valid slave marriages contracted in slave States with the consent of the master.

MARRIAGES BETWEEN SLAVES AND FREE NEGROES

Statutes relative to marriages between free Negroes and slaves are not numerous. Presumably, the term "persons of color" included both Negroes born free and those who had been slaves. A Tennessee court,³² in 1882, held that the formal marriage of a free Negro and a slave, with the consent of the master, followed by a cohabitation for years, was a valid marriage and entitled the woman to dower.

FEDERAL LEGISLATION

FEDERAL LEGISLATION

The Congress of the United States has had occasion to pass upon the validity of slave marriages only in connection with pensions to the descendants of colored soldiers. An act ³³ of 1873 provided that, in determining whether the widow of a Negro or Indian soldier and sailor is entitled to a pension, it is necessary only for the claimants to show that she was married according to some ceremony, which she and the deceased deemed obligatory, that they habitually recognized each other as husband and wife, and were so recognized by their neighbors, and that they lived together up to the date of his enlistment. It was also provided that the children of such marriages might claim their father's pension.

Though they proceeded in different ways, practically all of the States arrived at the same result. If slaves were married according to the custom, if they lived as husband and wife both before and after Emancipation, their union was considered a valid marriage to all intents and purposes and the children thereof might inherit. Where the procurement of a certificate or remarriage was required, if one of the parties took advantage of the opportunity to be freed from the early alliance, as happened in several amusing instances, and took another spouse, the second marriage was the valid one, and the children of the slave union could not inherit their parents' property.

It scarcely needs to add that, at present, the marriage requirements as to license, age, etc., are in all States precisely the same both for white and colored people.

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NOTES

- ¹ Laws of Fla., 1865, p. 31.
- ² *Ibid.*, 1866, p. 22.
- ³ Art. II, sec. 5, par. 5.
- ⁴ Laws of Ga., 1865-66, p. 240.
- ⁵ *Comer v. Comer*, 1892, 91 Ga. 314.
- ⁶ *Williams v. State*, 1881, 67 Ga. 260.
- ⁷ Laws of Ga., 1866, p. 156.
- ⁸ Laws of Mo., 1864, p. 68.
- ⁹ Laws of S. C., 1865, pp. 291-92.
- ¹⁰ *Ibid.*, 1871-72, pp. 162-63.
- ¹¹ Laws of Ky., 1865-66, p. 37.
- ¹² *Estill v. Rogers*, 1866, 1 Bush (Ky.) 62.
- ¹³ *Stewart, of color, v. Munchandler*, 1867, 2 Bush (Ky.) 278.
- ¹⁴ *Scott v. Lairamore*, 1895, 32 S. W. 172.
- ¹⁵ Laws of Ky., 1898, pp. 102-03.
- ¹⁶ Revised Stat. of La., 1870, p. 436, sec. 2212.
- ¹⁷ *Pierre v. Fontennette*, 1873, 25 La. Ann. 617.
- ¹⁸ Laws of Md., 1867, p. 858.
- ¹⁹ Code, 1867, p. 64.
- ²⁰ *Washington v. Washington*, 1881, 69 Ala. 281.
- ²¹ *Stikes v. Swanson*, 1870, 44 Ala. 633. See *Haden v. Ivey*, 1874, 51 Ala. 381.
- ²² Acts of Ark., 1866-67, p. 52.
- ²³ Laws of Tenn., 1865-66, pp. 65 and 81; Laws, 1869-70, p. 92.
- ²⁴ Art. XII, sec. 27.
- ²⁵ *Cumby v. Garland*, 1894, 25 S. W. 673; *Coleman v. Vollmer*, 1895, 31 S. W. 413.
- ²⁶ Laws of Va., 1865-66, pp. 85-86.
- ²⁷ Laws of W. Va., 1866, p. 102; Laws, 1872-73, p. 502.

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- ²⁸ Laws of Ill., 1891, pp. 163-64.
- ²⁹ *Butler v. Butler*, 1896, 44 N. E. 203.
- ³⁰ *McDowell v. Sapp*, 1883, 39 O. S. 558.
- ³¹ *Minor v. Jones*, 1876, 2 Redf. Sur. (N. Y.) 289.
- ³² *Down v. Allen*, 1882, 78 Tenn. (10 Lea) 652.
- ³³ 17 Stat. L., 570, chap. 234, par. 11.

CHAPTER VI

INTERMARRIAGE AND MISCEGENATION

ONE race distinction, which has not been confined to the South, and which has, in a large measure, escaped the adverse criticism heaped upon other race distinctions is the prohibition of miscegenation between the Caucasian and the colored races. The term "miscegenation" includes both intermarriage and all forms of illicit intercourse between the races. Twenty-six States and Territories, including all the Southern States, have laws forbidding the admixture of the races; applying not only to Negroes, but also to Indians and Mongolians in States where the latter races are present in considerable numbers.

INTERMARRIAGE DURING RECONSTRUCTION

It is significant that during the years of Reconstruction in the South, when the Federal and State governments were endeavoring to eradicate race distinctions, none of the statutes against miscegenation appear to have been repealed. There is some meager authority—a case which arose in Tennessee¹ in 1872, and two cases in North Carolina² in 1877—which might tend to show that the statutes of two Southern States were repealed. The Tennessee court was of opinion that intermarriage was not prohibited in Mis-

INTERMARRIAGE DURING RECONSTRUCTION

Mississippi, and the North Carolina courts arrived at the same conclusion about South Carolina; but neither court specified the years to which its statement applied, and a careful examination of the annual laws of Mississippi and South Carolina between 1865 and 1880 reveals no statutes repealing the laws against intermarriage in those States. One is led to conclude, therefore, that the statutes against miscegenation were disregarded in a few instances during Reconstruction, rather than repealed. This conclusion is helped out by the fact that the legislatures manifested no inclination to permit miscegenation. The legislature of South Carolina,³ for instance, in 1865, before the State government went into the hands of the Reconstructionists, enacted laws, covering twenty-five or more finely printed pages, defining the rights of Negroes in the most minute details, as was seen in considering the "Black Laws" of 1865-68. These laws were repealed nine months later, but the legislature was careful to add that the repealing act did not apply to that part of the Act of 1865 which said that marriage between a white person and a person of color should be illegal and void. The legislature of Texas,⁴ in like manner, on November 10, 1866, repealed most of its statutes relating to free Negroes, but added that nothing in the act should be construed to repeal any laws prohibiting intermarriage of the white and black races. The repealing statute of Arkansas⁵ of February 6, 1867, made practically the same exception as to intermarriage.

Determined as many of the Reconstruction promoters were to wipe out every vestige of legally recognized race distinctions, they did not allow their zeal to carry them to the extent of legislating as to the social relations of the

INTERMARRIAGE AND MISCEGENATION

racess. Georgia, probably fearing that some legislature might attempt to enact such measures, in its Constitutions of 1868⁶ and 1877⁷ had this general statement: "The social status of the citizen shall never be the subject of legislation." It would seem, on first thought, that this requirement would defeat its own purpose. If marriage is a social status and if legislation as to the social status of the citizen is forever prohibited, how can a law prohibiting intermarriage be constitutional? In a test case⁸ that arose in 1869 the Supreme Court of the State very neatly explained away this apparently embarrassing situation by saying, in effect, that the clause in the Constitution applied only to future legislation, and it did not affect the law prohibiting intermarriage then in force. After quoting that clause in the Constitution, the court went on to say: "In so far as the marriage relation is connected with the social *status*, the very reverse is true. That section of the Constitution forever prohibits legislation of any character regulating or interfering with the social status. It leaves social rights and *status* where it finds them. It prohibits the legislature from repealing any laws in existence, which protect persons in the free regulation among themselves of matters properly termed social, and it also prohibits the enactment of any new laws on that subject in the future." The Constitution of Alabama⁹ of 1901 provides against possible meddling by the legislature with domestic relations in more outspoken terms: "The legislature shall never pass any law to authorize or legalize any marriage between any white person and a Negro or descendant of a Negro."

TO WHOM THE LAWS APPLY

PRESENT STATE OF THE LAW AGAINST INTERMARRIAGE

The present situation as regards intermarriage is as follows: Intermarriage between the Caucasian and other races is prohibited by the Constitutions of six States, all Southern, namely: Alabama,⁹ Florida,¹⁰ Mississippi,¹¹ North Carolina,¹² South Carolina,¹³ and Tennessee.¹⁴ Intermarriage is prohibited by statute also in the above States and in twenty other States and Territories, namely: Alabama,¹⁵ Arizona,¹⁶ Arkansas,¹⁷ California,¹⁸ Colorado,¹⁹ Delaware,²⁰ Florida,²¹ Georgia,²² Idaho,²³ Indiana,²⁴ Kentucky,²⁵ Louisiana,²⁶ Maryland,²⁷ Mississippi,²⁸ Missouri,²⁹ Nebraska,³⁰ Nevada,³¹ North Carolina,³² Oklahoma,³³ Oregon,³⁴ South Carolina,³⁵ Tennessee,³⁶ Texas,³⁷ Utah,³⁸ Virginia,³⁹ and West Virginia.⁴⁰

TO WHOM THE LAWS APPLY

In the interpretation of these statutes against intermarriage, it is necessary, at the outset, to determine just who are included. If the statutes had simply enacted that there should be no intermarriage between Caucasians, on the one side, and Negroes, Indians, or Mongolians, on the other, they would have left the great body of mixed-blooded people to miscegenate as they pleased. Most of the States avoided this difficulty by stating clearly to whom the laws apply. Virginia and Louisiana are the only States simply to enact in general terms that there shall be no intermarriage between white persons and persons of color; and even in Virginia judicial decisions clearly define the term "person of color," so there is no difficulty in knowing who is meant

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by the statute. Arkansas, Colorado, Delaware, Idaho, and Kentucky prohibit intermarriage between white persons and Negroes or mulattoes. Georgia, Texas, and Oklahoma place within the prohibition of their statutes persons of African descent; West Virginia, Negroes; and Florida, Negroes, expressly including every person with one-eighth or more of Negro blood. Alabama makes its law apply to Negroes and their descendants to the fifth generation, though one ancestor of each generation was white. The Indiana and Missouri statutes extend to all persons having one-eighth or more Negro blood; Maryland to Negroes or persons of Negro descent to the third generation inclusive. Tennessee includes within the prohibition Negroes, mulattoes, or persons of mixed blood descended from a Negro to the third generation inclusive. The Nebraska law applies to persons of one-fourth or more Negro blood.

The States which have a large Indian or Mongolian population include these races within the prohibition. Thus, Arizona prohibits whites to intermarry with Negroes, Mongolians, or Indians and their descendants; California, with Negroes, Mongolians, or Indians and their descendants; California, with Negroes, Mongolians, or mulattoes. It is interesting to note that the word "Mongolian" was not added to the California statute⁴¹ till 1905. This addition, coming, as it does, so nearly contemporaneous with the school trouble in San Francisco, is evidence that California is facing a race problem which it considers serious. The Mississippi law applies to Negroes, mulattoes, persons who have one-eighth or more Negro blood, Mongolians or persons who have one-eighth or more Mongolian blood. Nevada includes black persons, mulattoes, Indians,

EFFECT OF ATTEMPTED INTERMARRIAGE

Chinese; Oregon, in addition to Negroes, prohibits intermarriage with Chinese and with persons having one-fourth or more Negro, Chinese, or Kanaka blood or having more than one-half Indian blood. Utah includes simply Negroes and Mongolians; North Carolina, Negroes and Indians. South Carolina prohibits intermarriage between whites and Indians, Negroes, mulattoes, mestizoes, or half-breeds.

EFFECT OF ATTEMPTED INTERMARRIAGE

Suppose a white person and a person within any of the prohibited classes do attempt to intermarry. What is the legal result? Indiana, Kentucky, Maryland, Nebraska, North Carolina, and Utah declare that such a marriage is void; Colorado, Missouri, and Virginia, that it is absolutely void; Arizona, Georgia, Oregon, and Tennessee, that it is null and void; Delaware and Mississippi, that it is unlawful and void; and Arkansas, California, and Idaho, that it is illegal and void. The law of Florida declares that such a marriage is unlawful, utterly null and void and the issue bastards and so incapable of inheriting. Louisiana provides that such a marriage is prohibited, the celebration of it forbidden, that the celebration carries with it no effect, and that the marriage is null and void. South Carolina enacts that it is "utterly null and void and of none effect." The only legal effect of a marriage thus declared void is to impose criminal liability upon the parties to it. The result is precisely the same as if no license had been obtained or ceremony performed and the parties had been indulging in illicit relations. A Virginia decision says: "No matter by what ceremonies or solemnities, such marriage would

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have been the merest nullity, and the parties must have been regarded under our laws, as lewdly associating and cohabiting together. . . ." ⁴²

The other States which prohibit intermarriage simply declare that marriage between white persons and Negroes is illegal and prescribe a punishment for the violation of the statute against miscegenation, but do not further define the legal effect of such a marriage contract. But whether the marriage is declared "void" or "null and void" or "absolutely void" or only "illegal," the result is the same.

PUNISHMENT FOR INTERMARRIAGE

Persons of different races who attempt to intermarry in violation of the laws subject themselves everywhere to severe penalties. In Alabama, the law says they shall be imprisoned in the penitentiary for not less than two, nor more than seven years. In Colorado, they are guilty of a misdemeanor and punishable by a fine of from fifty dollars to five hundred dollars, or imprisonment for not less than three months nor more than two years, or both. In Delaware, they are guilty of a misdemeanor and may be fined one hundred dollars. Florida says they shall be imprisoned in the State penitentiary not exceeding ten years or fined not exceeding one thousand dollars. In Indiana, if they knowingly violate the law—that is, if the white person knows the other is a Negro or of mixed blood—they are fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the State prison not less than one nor more than ten years. Maryland declares that they are guilty of an infamous crime, punish-

PUNISHMENT FOR INTERMARRIAGE

able by imprisonment in the penitentiary not less than eighteen months nor more than ten years. Mississippi makes the punishment a fine of five hundred dollars, imprisonment not exceeding ten years, or both. The law of Missouri declares that one who knowingly intermarries in violation of the statute shall be punished by imprisonment in the penitentiary two years or by a fine not less than one hundred dollars, or by imprisonment in the county jail not less than three months, or by both such fine and imprisonment, and adds that the jury shall determine the amount of Negro blood by appearance. Nevada enacts that the parties are guilty of a misdemeanor and shall be imprisoned in the State prison not less than one nor more than two years. North Carolina brands an attempted intermarriage as an infamous crime to be punished by imprisonment in the county jail or State prison not less than four months nor more than ten years, and the parties may also be fined at the discretion of the court. Oklahoma makes it a felony and provides that the parties shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment not less than thirty days nor more than one year, or both. Oregon simply makes it an offence punishable by imprisonment in the penitentiary or county jail between three months and one year. South Carolina⁴³ declares attempted intermarriage is a misdemeanor punishable by a fine of not less than five hundred dollars or imprisonment in the penitentiary from one to five years. Texas, by a law of 1858, still in force in 1879, prescribed a punishment for the white person who attempted to marry a Negro but no punishment for the Negro. A Federal

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court ⁴⁴ held that the difference of punishment was in violation of the Fourteenth Amendment, but that the law against intermarriage was constitutional. Virginia provides that the parties shall be confined in the penitentiary not less than two nor more than five years. West Virginia would confine them in jail, not over one year and fine them not exceeding one hundred dollars. Thus, it appears that in most of the States intermarriage is considered a very serious offence, ranking in Colorado, Delaware, Nevada, and South Carolina, as a misdemeanor; in Louisiana and North Carolina as an infamous crime; and in Tennessee and Oklahoma as a felony.

PUNISHMENT FOR ISSUING LICENSES

With no less severity do the States punish those who issue licenses to persons of one race to marry those of another. Alabama declares that anyone knowingly issuing a license for the marriage of a white and colored person shall be fined not less than one hundred dollars nor more than one thousand dollars and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months. Colorado makes it a misdemeanor punishable by a fine of one hundred dollars. Florida punishes it by imprisonment not exceeding two years or a fine not exceeding one thousand dollars. North Carolina simply declares it to be a misdemeanor without prescribing any punishment different from that for other misdemeanors. Oklahoma makes it a misdemeanor punishable by a fine of not less than one hundred nor more than five hundred dollars, or imprisonment in the county .

PUNISHMENT FOR PERFORMING THE CEREMONY

jail not less than thirty days nor more than one year, or both.

PUNISHMENT FOR PERFORMING THE CEREMONY

A heavy penalty is laid also upon one who performs the ceremony for those who marry in violation of the laws against miscegenation. Alabama provides that any justice of the peace, minister, or other person, who knowingly performs the marriage ceremony between a white and colored person, shall be fined not less than one hundred dollars nor more than one thousand and, at the discretion of the court, imprisoned in the country jail or sentenced to hard labor for the county for not more than six months. Arkansas makes anyone performing such a ceremony guilty of a high misdemeanor punishable by a fine of not less than one hundred dollars. Colorado declares that to perform the ceremony is a misdemeanor punishable by a fine of between fifty dollars and five hundred dollars or imprisonment between three months and two years, or both. In Delaware, it is a misdemeanor, and the punishment is a one hundred dollar fine. Florida either imprisons the person performing the ceremony not over one year or imposes a fine on him not exceeding one thousand dollars. North Carolina simply defines it as a misdemeanor. Indiana declares that one who knowingly counsels or assists in such a marriage shall be fined not less than one hundred dollars nor more than one thousand dollars. Nevada makes one who performs the ceremony guilty of a misdemeanor and subjects him to imprisonment in the State prison not less than one year nor more than three years. Oklahoma makes it a misdemeanor and imposes a fine of

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between one hundred dollars and five hundred dollars, or imprisonment between three months and a year, or both. The law of Oregon declares that one who wilfully and knowingly performs such marriage ceremony shall be imprisoned in the penitentiary or county jail from three months to one year and fined from one hundred dollars to one thousand dollars. South Carolina provides that one who knowingly and willingly unites persons of different races in the bonds of matrimony shall be guilty of a misdemeanor and punished by a fine of not less than five hundred dollars nor more than twelve months' imprisonment, or both. Virginia declares that he shall forfeit two hundred dollars, of which the informant shall get one-half; and West Virginia provides that the one who knowingly performs the ceremony shall be guilty of a misdemeanor and fined not over two hundred dollars.

COHABITATION WITHOUT INTERMARRIAGE

A few States have statutes relative to illicit relations between white and colored persons, where no marriage is pretended to exist. Alabama imposes for this offence upon both man and woman the same punishment as for intermarriage; a living together in adultery one day with intent to continue that relation has been held to constitute a violation of the statute.⁴⁵ Florida declares that, if any white person and Negro or mulatto shall live together in adultery or fornication with each other, each shall be punished by imprisonment not exceeding a year, or by a fine not exceeding a thousand dollars. The law adds that any Negro man and white woman or any white man and Negro

STATES REPEALING LAWS AGAINST INTERMARRIAGE

woman, not married to each other, who habitually live in and occupy in the night-time the same room, no other person over fifteen years of age being present, shall be punished by imprisonment not exceeding twelve months, or by a fine not exceeding five hundred dollars. Nevada provides that, if any white person shall live and cohabit with any black person, mulatto, Indian, or Chinese, in a state of fornication, such person so offending shall be fined not over five hundred and not less than one hundred dollars, or imprisonment in the county jail between one and six months, or both. Louisiana ⁴⁶ has the most recent and the most thorough-going statute against miscegenation; it was adopted July 1, 1908. It provides that concubinage between a white person and a Negro is a felony, punishable by imprisonment for not less than one month nor more than one year. Concubinage is defined as unlawful cohabitation of white persons and Negroes whether open or secret. It was made the duty of the judges to specially charge the grand juries upon this statute.

The most interesting feature about these statutes is that they impose a heavier penalty for cohabitation between a white and a colored person than between two members of the same race. Yet they have been held to comply with the Constitution of the United States. The reasons why such statutes are held to be constitutional will be considered later.

STATES REPEALING LAWS AGAINST INTERMARRIAGE

Only five States that once had laws against miscegenation have repealed them since 1865. New Mexico,⁴⁷ in

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1866, Rhode Island,⁴⁸ in 1881, and Maine,⁴⁹ in 1883, repealed their laws against intermarriage outright. A statute of Michigan ⁵⁰ in 1883 provided that all marriages theretofore contracted between white persons and those wholly or in part of African descent should be valid and effectual and the offspring legitimate, but it said nothing about marriages contracted in the future. Professor Frederick J. Stimson ⁵¹ has apparently interpreted the statute to apply to marriages in the future as well as to those already contracted. Finally, Ohio ⁵² in 1887 repealed its law of 1877, providing for the punishment of persons of "pure white blood" who intermarry or have carnal intercourse with any Negro or person having a distinct and visible admixture of African blood.

MARRIAGES BETWEEN THE NEGRO AND NON-CAUCASIAN RACES

It is significant that the States have not prohibited intermarriage between two different races except where one is the Caucasian. In no State is it unlawful for Mongolians and Indians, Negroes and Mongolians, or Negroes and Indians to intermarry. The only exception to the last is that in North Carolina ⁵³ it is unlawful for Negroes to intermarry with Croatan Indians or to go to the same school with them. To this statute hangs a beautiful historical tradition. In 1585, the date of the first attempt by Englishmen to colonize the New World, there was an island off the coast of North Carolina called Croatoan. By the shifting of the sands, it is now probably a part of Hatteras or Ocracoke Island. In 1587, a colony of one

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hundred and seventy-seven persons under John White was landed by Sir Walter Raleigh on this island. Here, the same year, was born Virginia Dare, granddaughter of John White and the first child of English parents born in America. Later, part of the colonists under White had to go back to England to seek further aid. By agreement, those left behind were to go over to the friendly Croatoan Indians if they needed succor. When Governor White returned many months later, he found the settlement deserted and carved upon a tree nearby the single word "Croatoan." This supposedly meant that the colonists had gone over to the Croatoans. For some unexplained reason, the party under White never went in search of their lost brethren. Not a word more has ever been heard of Virginia Dare and the others. A tradition says that they went over to the Croatoans and eventually became absorbed into that tribe.⁵⁴ Credence is given to this by the fact that there are many Croatoan Indians—now called Croatans—with light complexion and blue eyes. Recently a considerable body of mixed-blooded Indians in Robeson County, North Carolina, have laid claim to descent from this lost colony, and the State has officially recognized them under a separate name as the "Croatan Indians." Thus, all that is left of Virginia Dare and the Lost Colony is this tradition supported by the presence of Indians with fair skin and blue eyes, and the statute of North Carolina that the blood of these early settlers shall not be further adulterated, by miscegenation, with the blood of the Negro.

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EFFECT GIVEN TO MARRIAGES IN OTHER STATES

The next question is the interpretation of the laws against intermarriage. What effect will a State that prohibits miscegenation give to a marriage between a white person and Negro in a State that permits intermarriage? What effect, for instance, will Virginia give to a marriage of a white woman to a Negro man contracted in Massachusetts if the parties go to Virginia to live? If the Negro and white woman were residents in good faith of Massachusetts or of some State that permits intermarriage at the time of their marriage, their marriage will, as a general rule, be recognized as valid everywhere—even in the Southern States. Several States, including Arkansas, Colorado, Idaho, Indiana, Kentucky, and probably others, in their statutes prohibiting intermarriage make the provision that, if the marriage is valid where consummated, it will be considered valid by those States. A Tennessee⁵⁵ court in 1872 did refuse to recognize as valid a marriage celebrated in Mississippi when intermarriage was permitted in Mississippi, but this appears to be the only case taking that view.

If, on the other hand, the parties leave a State which prohibits intermarriage and go to another State which allows it, solely for the purpose of evading the laws of the former State, the authority is practically unanimous that the marriage is not valid in the State the laws of which they attempted to evade. This point is covered both by statute and by judicial decision. A Delaware statute, for instance, declares that the Negro and white person are equally guilty if they are married in another State and

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move into Delaware as if they had been married in Delaware. Mississippi, also, punishes parties attempting to evade its laws by marrying out of the State and returning to Mississippi, to the same extent as if they had attempted to intermarry in Mississippi. The Georgia statute, which is typical, is as follows: "All marriages solemnized in another State by parties intending at the time to reside in this State shall have the same legal consequences and effect as if solemnized in this State. Parties residing in this State cannot evade any of the provisions of its laws as to marriage by going into another State for the solemnization of the ceremony." Statutes to the same effect are in force in Arizona, Virginia, West Virginia, and possibly other States. In the absence of statute, the point is covered with the same result by judicial decision. In the Tennessee case, to which reference has already been made, the court said: "Each State is sovereign, a government within, of, and for itself, with the inherent and reserved right to declare and maintain its own political economy for the good of its citizens, and cannot be subjected to the recognition of a fact or act contravening its public policy and against good morals, as lawful, because it was made or existed in a State having no prohibition against it or even promoting it."

In 1878, a Negro man and a white woman went over from Virginia⁵⁶ into the District of Columbia, were married, and returned to Virginia, where they were prosecuted. The Virginia court held that, although the forms and ceremonies of marriage are governed by the laws of the place where marriage is celebrated, the essentials of the contract depend upon and are governed by the laws of the

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country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. This case was affirmed by the Federal court ⁵⁷ the next year. A Georgia ⁵⁸ couple who also went to the District of Columbia to be married, returned to their native State, where they were indicted and convicted for violating the Georgia statute against intermarriage.

It appears that Washington has been and is the City of Refuge for such miscegenating couples. It has been held, however, in every case, that, when these people return to Southern States, no matter where married, they are amenable to the laws of those States. In fact, there appears to be only one American case with regard to Negroes which holds a contrary doctrine, the case of *Medway v. Needham*.⁵⁹ There a white person and Negro, living in Massachusetts, which at the time, 1819, prohibited intermarriage, went to Rhode Island, where they were married and whence they immediately returned. The Supreme Court of Massachusetts held that a marriage, if valid where celebrated, is valid everywhere; the court taking no account of the purpose of the parties to evade the law. In rendering this decision, the Court admitted that it was going counter to the opinion of eminent jurists. The decision has not been followed, it appears, by any other court. It may be taken as settled that, if the parties leave the State for the purpose of evading its law, intending at the time to return to that State, the marriage will not be recognized as valid when they do return. But, if they leave the State to evade the law, not intending at the time to return and do gain a *bona fide* residence in another State and, after that, do return, the marriage will be recognized.

INTERMARRIAGE AND THE FEDERAL CONSTITUTION

In other words, to furnish a State grounds to declare void a marriage celebrated in another State where it is valid, the parties must intend not only to evade the law but also not to gain a *bona fide* residence in the State to which they go.

Efforts have been made to prohibit intermarriage in the District of Columbia. At the last session of the Sixtieth Congress, Senator Milton, of Florida, introduced a bill to make intermarriage between white persons and Negroes a crime punishable by imprisonment for ten years and a fine of one thousand dollars, providing that one with one-eighth or more Negro blood should come within the prohibition, declaring such marriages to be null and void and the issue resulting from them illegitimate and so incapable of inheritance. This bill apparently died in the committee room. A resolution in the Senate to recall it from the Committee on the Judiciary was tabled on March 1, 1909, by a vote of 43 to 21.

INTERMARRIAGE AND THE FEDERAL CONSTITUTION

The constitutionality of State statutes and judicial decisions which have refused to recognize marriages between Negroes and white persons celebrated in other States or in the District of Columbia have been attacked on two grounds: First, that they are in violation of article one, section ten, of the Constitution of the United States, which says, in part, that no State shall pass any law impairing the obligation of contracts; and, secondly, that they contravene that part of the Fourteenth Amendment which says that no State shall make or enforce any law which shall abridge

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the privileges and immunities of citizens of the United States.

Marriage is declared by the statutes of the States which prohibit intermarriage, just as by other States, to be a civil contract. If it is a contract and if marriage between a white person and a Negro in Massachusetts, for instance, is valid, when the parties go to South Carolina to live, how can the South Carolina courts declare the marriage a nullity and prosecute the parties for fornication and adultery without contravening the Federal Constitution? The only answer is: Marriage is a civil contract, but it is something more. Almost without exception, the courts have held that a State has the absolute control of the marriage status within its borders. The early case of *State v. Gibson*,⁶⁰ coming in 1871 during Reconstruction, sounded a warning to the Federal Government's interfering with the laws of marriage. The court said: "In this State [Indiana] marriage is treated as a civil contract, but it is more than a mere civil contract. It is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness, and well-being of society. In fact, society could not exist without the institution of marriage, for upon it all the social and domestic relations are based. The right of all the States to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the States suffer or permit any interference therewith. If the Federal Government can determine who may marry in a State, there is no limit to its power. . . ."

INTERMARRIAGE AND THE FEDERAL CONSTITUTION

The Supreme Court of Alabama⁶¹ in 1872 declared that the laws against intermarriage did contravene the Civil Rights Bill and the Fourteenth Amendment. But this case was expressly overruled by *Green v. State*,⁶² in which the court, answering both of the objections, said, "Marriage is not a mere contract, but a social and domestic institution upon which are founded all society and order, to be regulated and controlled by the sovereign power for the good of the State; and the several States of the Union in the adoption of the recent Amendments to the Constitution of the United States designed to secure to citizens rights of a civil or political nature only, and did not part with their hitherto unquestioned power of regulating, within their own borders, matters of purely social and domestic concern."

There are Federal cases to support the position of the State Courts. But it is of no use to pile up citations of decisions further to establish the well-accepted doctrine that marriage is more than a civil contract, that it is a domestic institution, and that a State, by virtue of its police power, has absolute control as to who may contract marriages or live in that relation within its borders.⁶³

Twenty-six States and Territories prohibit intermarriage between the white and other races. They recognize as valid such marriages when contracted in a State which allows them, unless the parties are trying to evade the laws of the State of their domicile or of their intended matrimonial residence. The States prescribe a heavier penalty for illicit intercourse between white persons and persons of another race than for the same offence between two per-

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sons of the same race; they inflict heavy punishments upon ministers and other officials who perform a marriage ceremony between a white person and one of another race, and upon those who issue licenses for such a marriage; and they declare the offspring of such marriages illegitimate and incapable of inheritance. In each of these positions, the courts, Federal as well as State, have upheld the twenty-six States and Territories.

Twenty-four States and Territories do not prohibit intermarriage between the white and other races. It is not within the province of this study to consider the actual amount of admixture that is going on in these States. But inasmuch as Boston has often been cited as the city in which the number of marriages between white persons and Negroes is very large (estimated by Senator Money, of Mississippi, at 2,000 in 1902), the report of the registry department of Boston for the years 1900-1907 is here added:

INTERMARRIAGES IN BOSTON

	Colored man White woman	White man Colored woman	Total Number of Mixed Marriages
1900	32	3	35
1901	30	1	31
1902	25	4	29
1903	27	2	29
1904	27	1	28
1905	17	2	19
1906	17	2	19
1907	28	4	32

From this it appears that the number, never appreciably large, has been steadily decreasing.

NOTES

The following is what Mr. Ray Stannard Baker ⁶⁴ has to say about the precise fact of intermarriages in the Northern States in general: "In the great majority of intermarriages the white women belong to the lower walks of life. They are German, Irish, or other foreign women, respectable but ignorant. As far as I can see from investigating a number of such cases, the home life is as happy as that of other people in the same stratum of life. But the white woman who marries a Negro is speedily declassed: she is ostracised by the white people, and while she finds a certain place among the Negroes, she is not even readily accepted as a Negro. In short, she is cut off from both races. When I was at Xenia, O., I was told of a case of a white man who was arrested for living with a Negro woman. The magistrate compelled him to marry the Negro woman as the worst punishment he could invent.

"For this reason, although there are no laws in most Northern States against mixed marriages, and although the Negro population has been increasing, the number of intermarriages is not only not increasing, but in many cities, as in Boston, it is decreasing. It is an unpopular institution."

NOTES

¹ State v. Bell, 1872, 7 Baxter (Tenn.) 9.

² State v. Ross, 1877, 76 N. C. 242; State v. Kennedy, 1877, 76 N. C. 251.

³ Laws of S. C., 1866, extra sess., pp. 393-94.

⁴ Laws of Tex., 1866, p. 131.

⁵ Laws of Ark., 1866-67, p. 99.

⁶ Art. I, sec. 11.

⁷ Art. I, par. 18.

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- ⁸ Scott v. State, 1869, 39 Ga. 321.
- ⁹ Sec. 102.
- ¹⁰ Const., 1885, art. XVI, sec. 24.
- ¹¹ Const., 1890, art. XIV, sec. 7.
- ¹² Const., 1875, art. XIV, sec. 8.
- ¹³ Const., 1895, art. III, sec. 33.
- ¹⁴ Const., 1870, art. XI, sec. 14.
- ¹⁵ Code, 1907, III, sec. 7421.
- ¹⁶ Revised Stat., 1901, secs. 3092 and 3094.
- ¹⁷ Kirby's Digest, 1904, secs. 5174, 5177, and 5183.
- ¹⁸ Civil Code, 1906, sec. 60.
- ¹⁹ Revised Stat., 1908, secs. 4163 and 4165.
- ²⁰ Revised Code, 1852, as amended in 1893, p. 593.
- ²¹ General Stat., 1906, secs. 2579, 3529, and 3531-32.
- ²² Code, 1895, II, secs. 2422-25.
- ²³ Revised Code, 1908, I, secs. 2616 and 2619.
- ²⁴ Annotated Stat., 1908, secs. 2641, 2642, 8360, and 8367.
- ²⁵ Statutes, 1909, secs. 4615 and 4619.
- ²⁶ Merrick's Revised Civil Code, 1900, art. 94.
- ²⁷ Public Gen. Laws, I, sec. 305, p. 878.
- ²⁸ Code, 1906, secs. 1031 and 3244.
- ²⁹ Annotated Stat., 1906, II, sec. 2174.
- ³⁰ Compiled Stat., 1907, sec. 4275.
- ³¹ Compiled Laws, 1861-1900, secs. 4851-52.
- ³² Pell's Revisal of 1908, I, secs. 2083 and 3369-70.
- ³³ General Stat., 1908, secs. 3260 and 3262.
- ³⁴ Bellinger and Cotton's Codes and Stat., I, secs. 1999-2001 and II, sec. 5217.
- ³⁵ Code, 1902, I, sec. 2664.
- ³⁶ Code, 1896, secs. 4186-87.
- ³⁷ Sayles's Civil Stat., I, art. 2959.
- ³⁸ Compiled Laws, 1907, sec. 1184.
- ³⁹ Pollard's Code, 1904, sec. 2252.

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- ⁴⁰ Code, 1899, p. 972.
- ⁴¹ Laws of Calif., 1905, p. 554.
- ⁴² Kinney's Case, 1878, 30 Grat. (Va.) 858, 861.
- ⁴³ Code of Criminal Procedure, 1902, sec. 293.
- ⁴⁴ *Ex parte* Francois, 1879, Fed. Case No. 5,047.
- ⁴⁵ *McAlpine v. State*, 1897, 117 Ala. 93; 23 So. 130.
- ⁴⁶ Acts of La., 1908, pp. 105-06.
- ⁴⁷ Laws of N. M., 1866, p. 90.
- ⁴⁸ Acts of R. I., Jan. sess., 1881, p. 108.
- ⁴⁹ Laws of Me., 1883, p. 167.
- ⁵⁰ Pub. Acts of Mich., 1883, p. 16.
- ⁵¹ Frederick J. Stimson, "American Statute Law," I, p. 668.
- ⁵² Laws of O., 1877, p. 277; 1887, p. 34.
- ⁵³ Laws of N. C., 1887, p. 494.
- ⁵⁴ Edward Channing, "History of the United States," The Macmillan Co., 1905, I, pp. 128-30.
- ⁵⁵ *State v. Bell*, 1872, 7 Baxter (Tenn.) 9.
- ⁵⁶ *Kinney v. Com.*, 1878, 30 Grat. (Va.) 858.
- ⁵⁷ *Ex parte* Kinney, 1879, Fed. Case No. 7,825.
- ⁵⁸ *State v. Tutty*, 1890, 41 Fed. 753.
- ⁵⁹ 16 Mass. 157 (1819).
- ⁶⁰ 36 Ind. 389 (1871).
- ⁶¹ *Burns v. State*, 1872, 48 Ala. 195.
- ⁶² 58 Ala. 190 (1877).
- ⁶³ *State v. Hairston*, 1869, 63 N. C. 451; *Lonas v. State*, 1871, 50 Tenn. (3 Heisk) 287; *Frasher v. State*, 1877, 3 Tex. Ap. 263.
- ⁶⁴ "Following the Colour Line," pp. 172-73.

CHAPTER VII

CIVIL RIGHTS OF NEGROES

THE Thirteenth Amendment to the Federal Constitution, prohibiting slavery or involuntary servitude, except as a punishment for crime, was proposed to the legislatures of the thirty-six States on February 1, 1865, a little over two months before the surrender of Lee at Appomatox, and was declared to have been ratified by twenty-seven States, the requisite three-fourths, by December 18, 1865. The latter date marked the Negro's final freedom from physical bondage. His body could no longer be owned as chattel property. But there is a vast difference between being able to say "No man owns my body," and "I have the same rights, privileges, and immunities as other free men." This difference the Thirty-ninth Congress—that of 1865–1866—fully realized, and grappled with.

The first ten Amendments were passed soon after the adoption of the Constitution to satisfy the demands of those who were jealous of the power of the Federal government. These, in brief, guaranteed to the citizens of the United States (1) freedom of religion, speech, press, assembly, and of petition for redress of grievances; (2) the right to keep and bear arms; (3) the right not to have soldiers quartered in one's house in time of peace without one's consent; (4) freedom from unreasonable searches and

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seizures; (5) the right not to be denied life, liberty, or property without due process of law; (6) the right to trial by jury; (7) the right of the accused to be confronted by his accuser; (8) the right not to have one's property taken for public use without compensation; and (9) the right not to be subjected to cruel or unusual punishment, and not to have excessive bail required. These were limitations upon the power of Congress, the States themselves having guaranteed such rights to their own citizens by their bill of rights. After the War, the Federal government was fearful that the States, particularly those lately in rebellion, would not grant these rights or privileges to the freedmen, who, according to the Dred Scott decision, were not citizens. All the power that Congress had over the States, it seems, was to enforce the Thirteenth Amendment by appropriation legislation. But it proceeded to make the most of the power it had, biding its time when another amendment to the Constitution would give it more power over the States.

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The first step taken by Congress, under the power supposedly arising out of the Thirteenth Amendment, was an attempt to secure to the Negro his so-called "civil rights." Unfortunately, there seems to be no succinct definition of this term. Bouvier¹ defines the phrase thus: "A term applied to certain rights secured to citizens of the United States by the Thirteenth and Fourteenth Amendments to the Constitution and by various acts of Congress made in pursuance thereof." This definition, however, helps little,

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and one is thrown back upon the Amendments and subsidiary enactments themselves to work out from them what are the civil rights of a citizen and of the Negro in particular.

During the summer and fall of 1865, between the close of the War and the convening of Congress, there had developed on the part of the radical element of the Republican party under Thaddeus Stevens an opposition to President Johnson's Reconstruction plans. The first Civil Rights Bill passed the Senate on February 2, 1866, passed the House a few days later, but on March 27, was returned with the veto of the President. It was passed, however, over his veto on April 9, 1866, and was thereafter known as the Civil Rights Bill ² of 1866. The first section reads: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell hold, and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

It is evident that the first phrase was intended to con-

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travene the Dred Scott decision and to establish the Negro's citizenship. While the Bill was before Congress, the great subject of debate was as to just what rights would be given thereby to the Negro. Some opposed it because they thought it would give him the right of suffrage, the right to intermarry with whites, to attend the same schools and churches, to sit on juries, and to testify in courts. It must be remembered that the "Black Laws" of the free States were still in force, and the Congressmen from those States were as jealous of Federal interference on the subject as those from the Southern States.

It is not the purpose here to discuss the Civil Rights Bill as it was regarded by the people, but rather as it was interpreted by the courts. Although it stood scarcely more than two years before it was eclipsed and practically superseded by the Fourteenth Amendment, nevertheless it stood long enough to be tested by the courts.

The Negroes, prompted in some instances probably by white persons, undertook immediately to see what rights were really secured to them by the Bill. In Tennessee and Mississippi, in 1866, convictions were had under the existing State laws against intermarriage, as there had previously been. Appeal to the Federal Supreme Court was talked of, but nothing came of it. With a view to testing their rights, Negroes in New York demanded sleeper accommodations on railroads, and went to fashionable restaurants and demanded the right to sit with the white patrons, but in both instances were refused. In Baltimore they sought accommodations on street cars, in theatres, saloons, etc. with whites, but were met with the same refusal.³

The constitutionality of the Bill was denied in 1867 by the Court of Appeals of Kentucky,⁴ on the ground that it invaded the right of the State to regulate its own domestic concerns. But its constitutionality was upheld in two cases: *United States v. Rhodes*,⁵ 1866, in the Circuit Court, a case involving the right of a Negro to testify, and *In re Turner*,⁶ in the Circuit Court also, a Maryland case involving the laws of apprenticeship.

It appears that none of the cases involving the rights of Negroes in public places, which are being considered particularly in this chapter, reached the higher courts. But Mr. Flack⁷ says: "The instances we have cited, however, are apparently sufficient to justify the conclusion that the belief prevailed generally—north, east, west and south—especially among the Negroes, that the Civil Rights Bill gave the colored people the same rights and privileges as white men as regards travel, schools, theatres, churches, and the ordinary rights which may be legally demanded. There also seems to have been a less general belief that it also permitted the intermarriage of the races."

As interesting as it would be to trace this Bill and the subsequent Federal enactments through Congress, it would take one too far afield. He must accept the products as they came from the crucible of debate, and interpret their effect upon the rights of Negroes.

The Civil Rights Bill of 1866 was practically superseded by the first section of the Fourteenth Amendment, ratified by thirty-six States and declared operative July 28, 1868. This section reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

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of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

Mr. Flack ⁸ says that the purpose in the adoption of this Amendment was (1) to make the Bill of Rights (the first eight Amendments) binding upon the States as well as upon the Nation; (2) to give validity to the Civil Rights Bill of 1866; and (3) to declare who were citizens of the United States. As he shows by an analysis of the debates in Congress, the constitutionality of the Civil Rights Bill of 1866 was doubted by many of its able advocates, and it was natural that they should desire to make their tenets secure by incorporating them into the Constitution itself. It is worth remarking that on May 1, 1870, the Civil Rights Bill of 1866 was practically re-enacted.⁹

The words "Negro," "race," or "color" do not appear in the first section of the Fourteenth Amendment; but a study of the speeches before the House and Senate would show that the legislators had the Negro primarily in mind, and so the court understood. In the Slaughter-House Cases ¹⁰ of 1872, cases not having to do with the Negro in the slightest degree, Mr. Justice Miller gave an interpretation of the Fourteenth Amendment which has stood as a landmark. He said: "... on the most casual examination of the language of these Amendments [Thirteenth, Fourteenth, and Fifteenth], no one can fail to be impressed with the one pervading purpose found in them all, laying at the foundation of each, and without which none of them

would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the Fifteenth Amendment, in terms, mentions the Negro by speaking of his color and his slavery. But it is just as true that each of the other articles were addressed to the grievances of that race, and designed to remedy them as the Fifteenth. We do not say that no one else but the Negro can share in their protection. . . . But we do say . . . that in any fair and just construction of any section or phrase of these Amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it." Without further citation of authorities, it may be assumed that the primary purpose of Congress in drafting the Fourteenth Amendment was to secure and protect the rights and privileges of Negroes.

The next Federal legislation on the subject was the Civil Rights Bill ¹¹ of 1875, which declared that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres and other places of public amusement, subject only to the conditions established by law and applicable alike to citizens of every race and color, regardless of any previous condition of

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servitude. The penalty for the violation of this law was the forfeiture of five hundred dollars to the person aggrieved and a fine of not less than five hundred dollars nor more than one thousand dollars or imprisonment not less than three months nor more than one year. The District and Circuit Courts of the United States were given exclusive jurisdiction of offences against this statute. District attorneys, marshals, and deputy marshals of the United States, and commissioners appointed by the Federal courts were authorized to proceed against those violating the provisions of the act.

The years between 1865 and 1875 had witnessed changes in the attitude of Congress toward the civil rights of Negroes. The Bill of 1866 was general in its terms, yet Congress did not feel secure till the Fourteenth Amendment had been passed to give validity, in a sense, to what had already been done. Now in 1875 Congress passed a bill which far surpassed in scope anything that had theretofore been undertaken. It is surprising that the test case of its constitutionality did not reach the court of last resort before 1883. During the year of its passage, 1875, doubt was thrown upon its validity by Judge Dick in charging the grand jury of the Federal Circuit Court of North Carolina,¹² who said, in part: "Every man has a natural and inherent right of selecting his own associates, and this natural right cannot be properly regulated by legislative action, but must always be under the control of the individual taste or inclination." The same year, Judge Emmons, of the Circuit Court in Tennessee,¹³ ruled that the Fourteenth Amendment applied to State and not individual action, and that the Federal government could

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not require individual inn-keepers, theatre managers, etc., to entertain Negroes.

The constitutionality of the Civil Rights Bill of 1875, however, was finally settled in 1883. That year five cases ¹⁴ reached the Supreme Court, all of which had to do with the civil rights of Negroes. Two of them concerned the rights of colored persons in inns and hotels; two, their rights in theatres; and one, in railroad cars. Mr. Justice Bradley, delivering the opinion of the court, took the ground that the first and second sections of the Civil Rights Bill were unconstitutional for these reasons: (1) They are not authorized by the Thirteenth Amendment, abolishing and prohibiting slavery, because the separation of the races in public places is not a badge of servitude. "It would be running the slavery argument into the ground," he said, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach, or cab, or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business." (2) The Civil Rights Bill is not authorized by the Fourteenth Amendment, because that refers to action by the State, while the Bill refers to individual discrimination. It is State action of a particular kind that is prohibited. "Individual invasion of individual rights," he argued, "is not the subject matter of the amendment. . . . It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States. . . . It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but

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to provide modes of relief against State legislation or State action. . . . It does not authorize Congress to create a code of municipal laws for the regulation of private rights, but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the Amendment . . . until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said Amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the Amendment are against State laws and acts done under State authority."

The effect of this decision is that the Federal government cannot prevent the curtailment of the civil rights of Negroes by individuals unless such individuals are acting under sanction of State statutes, and in that case, the Federal court can only declare that the State statute is unconstitutional.

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The Civil Rights Bill of 1875 was the last effort of Congress to guarantee to Negroes their civil rights. It is well now to turn back in point of time, and trace the action of the State legislatures on the subject. It has been deemed advisable to let the year 1883 be the dividing point in the history of the latter legislation. Before that time the States were moving in conjunction with the Nation;

after, the impotence of the Nation having been declared by its Supreme Court, the burden of defining and securing civil rights to Negroes devolved upon the States. Moreover, it is well to treat the Southern States and the States outside the South separately, because of the abnormal conditions in the former occasioned by Reconstruction.

In States Outside of South

Between 1865 and 1883 there was comparatively little legislation in the Northern, Eastern, and Western States as to civil rights. This was naturally so because these States were waiting to see what the Federal government meant to do. A brief examination of what little legislation there was will be made.

On May 16, 1865, Massachusetts¹⁵ declared that there should be no distinction, discrimination, or restriction on account of color or race in any licensed inn, public place of amusement, public conveyance, or public meeting, and imposed a fine of fifty dollars for the violation of this law. The next year it included theatres¹⁶ within the prohibition, but weakened the force of the statute by saying that there should be no exclusion or restriction "except for good cause."

The attitude of Delaware¹⁷ toward civil rights is probably the most interesting of any of the Northern States. On April 11, 1873, its legislature passed the following "joint resolution in opposition to making Negroes the equals of white men, politically or socially":

"That the members of this General Assembly, for the people they represent, and for themselves, jointly and individually, do hereby declare uncompromising opposition

to a proposed act of Congress, introduced by Hon. Charles Sumner at the last session, and now on file in the Senate of the United States, known as the 'Supplemental Civil Rights Bill,' and all other measures intended or calculated to equalize or amalgamate the Negro race with the white race, politically or socially, and especially do they proclaim unceasing opposition to making Negroes eligible to public offices, to sit on juries, and to their admission into public schools where white children attend, and to the admission on terms of equality with white people in the churches, public conveyances, places of amusement, or hotels, and to any measure designed or having the effect to promote the equality of the Negro with the white man in any of the relations of life, or which may possibly conduce to such result.

"That our Senators in Congress be instructed, and our Representatives requested to vote against and use all honorable means to defeat the passage by Congress of the bill referred to in the foregoing resolution, known as the 'Supplemental Civil Rights Bill,' and all other measures of a kindred nature, and any and every attempt to make the Negro the peer of the white man."

Upon the heels of this resolution, in 1875, Delaware¹⁸ enacted a statute on March 15, 1875, which provided that no keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers, should be obliged by law to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, or would injure his business. The term "customers" was taken to include all who sought

entertainment or refreshment. The proprietor of a theatre or other public place of amusement was not obliged to receive into his show, or admit into the place where he was pursuing his occupation, any person whose presence there would be offensive to the major part of his spectators or patrons, and thereby injure his business. Any carrier of passengers might make such arrangements in his business as would, if necessary, assign a particular place in his cars, carriages, or boats, to such of his customers as he might choose to place there, and whose presence elsewhere would be offensive to the major part of the traveling public, where his business was conducted; but the accommodations must be equal if the same price for carriage was required of all. This is still the law in Delaware. Taken in connection with the joint resolution above, there is little doubt that the legislature intended to make possible the drawing of a color line, though it did not expressly say so. It is noteworthy that, during the stormy years of Reconstruction, some case testing its constitutionality did not arise. Only one other State has had a statute anything like the Delaware law, and that is Tennessee, which statute and, with it, apparently the only case involving the constitutionality of the law that has reached the courts will be discussed later.

A Kansas ¹⁹ statute of April 25, 1874, which is still law, provided that there should be no distinction on account of race, color, or previous condition of servitude in any State university, college, or other school of public instruction, or in any licensed inn, hotel, boarding house, or any place of public entertainment or amusement, or any steamboat, railroad, stage coach, omnibus, street car, or any other

means of public carriage for persons or freight, under penalty of a fine of from ten to one thousand dollars.

New York,²⁰ on April 9, 1874, passed a Civil Rights Bill which prohibited race distinctions in inns, public conveyances on land and water, theatres, other public places of amusements, common schools, public institutions of learning, and cemeteries. It further declared that the discrimination against a citizen on account of color, by the use of the word "white," or any other term, in any law, statute, ordinance, or regulation, should be repealed. In 1881, it specifically mentioned hotels, inns, taverns, restaurants, public conveyances, theatres, and other places of public resort or amusement.²¹

In South

One would naturally expect that most of the legislation in the South guaranteeing civil rights to Negroes would have come during the period that their governments were in the hands of the Reconstructionists, and such is the case.

In 1866 a Florida²² statute made it a misdemeanor for a person of color to intrude himself into any religious or other public assembly of white persons, or into a railroad car or other public vehicle set apart for the exclusive accommodation of white people, or for a white person so to intrude upon the accommodations of colored persons. By 1873, however, the political revolution had come, and a statute²³ of that year forbade discrimination on account of race, color, or previous condition of servitude, in the full and equal enjoyment of the accommodations, etc., of inns, public conveyances on land and water, licensed theatres, other places of public amusement, common schools, public

institutions of learning, cemeteries, and benevolent associations supported by general taxation. This prohibition did not apply to private schools or cemeteries established exclusively for white or colored persons. It added, as did the law of New York, that there should be no discrimination in any laws by using the word "white."

A statute of Louisiana²⁴ in 1869 prohibited any discrimination on account of race or color by common carriers, innkeepers, hotel keepers, or keepers of public resorts. The license of such places had to contain the stipulation that they must be open to all without distinction or discrimination on account of color. The penalty was forfeiture of the license and a suit for damages by the party aggrieved. This statute²⁵ was strengthened in 1873 by the further provision that all persons, without regard to race or color, must have "equal and impartial accommodations" on public conveyances, in inns and other places of public resort. It was the duty of the attorney-general to bring suit in the name of the State to take away the license of anyone violating the law. The statute imposed a fine upon common carriers running from other States into Louisiana who made any discrimination against citizens of the latter on account of race or color.

Arkansas,²⁶ in 1873, required the same accommodations to be furnished to all by common carriers, keepers of public houses of entertainment, inns, hotels, restaurants, saloons, groceries, dramshops, or other places where liquor was sold, public schools, and benevolent institutions supported in whole or partly by general taxation.

The law of Tennessee²⁷ of 1875 is in a very different tone, it being very much like, as has been said before, that

of Delaware. That statute reads: "The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is hereby abrogated; and hereafter no keeper of any hotel, or public house, or carrier of passengers for hire, or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person, whom he shall for any reason whatever, choose not to entertain, carry, or admit, to his house, hotel, carriage, or means of transportation or place of amusement; nor shall any right exist in favor of any such person so refused admission, but the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, shall be as perfect and complete as that of any person over his private house, carriage, or private theatre, or place of amusement for his family." This Tennessee law is even more sweeping than that of Delaware. In the latter, common carriers may provide separate accommodations for persons that would be disagreeable to the major portion of the traveling public; in the former, the common carrier might exclude such persons altogether. According to the Tennessee statute, every railroad company in the State had a right to refuse absolutely to carry Negroes on its cars. Of course, this has been changed by its "Jim Crow" laws. The case of *State v. Lasater*,²⁸ dealing with the second section of the Tennessee statute, has the following to say about the whole enactment: "This is an extraordinary statute. It

is generally understood to have been passed to avoid the supposed effects of an act of Congress on the same subject, known as the Civil Rights Bill."

The constitutionality of the Tennessee and Delaware statutes has not been tested, as far as is known. Therefore, in the absence of authority, an opinion on the matter is of little value, but the following suggestion is ventured: Originally, hotels and inns were no more public places than a man's dwelling, and one could choose his patrons just as he could choose the guests he would entertain, and might exclude anyone without giving his reasons for it, as a merchant might refuse to sell goods to anyone he chose. For historical reasons, which need not be discussed here, the courts held that an inn-keeper should not be allowed to refuse an applicant for entertainment unless he had some valid reason for it. The common law thereafter considered hotels, etc., public places. It has been seen that the Civil Rights Cases held that the Federal government cannot prohibit a hotel-keeper from refusing to receive an applicant, but that the regulation of such domestic relations is within the exclusive control of the State. If the State sees fit to pass a statute abrogating the common law, as Tennessee and Delaware did, and making hotels, etc., private places, as they were originally, there seems to be no valid constitutional objection. The reasoning that applies to hotels will apply to other places now considered public, possibly even to public conveyances.

The following resolution of the legislature of North Carolina ²⁹ of 1877 is worth quoting in full. It is especially significant because it was passed after the Reconstruction régime was over, and the State government had passed

back into hands of the Democratic party, with Zebulon B. Vance as Governor.

“Whereas, In the providence of God, the colored people have been set free, and this is their country and their home, as well as that of the white people, and there should be nothing to prevent the two races from dwelling together in the land in harmony and peace;

“Whereas, We recognize the duty of the stronger race to uphold the weaker, and that upon it rests the responsibility of an honest and faithful endeavor to raise the weaker race to the level of intelligent citizenship; and

“Whereas, The colored people have been erroneously taught that legislation under Democratic auspices would be inimical to their rights and interests, thereby causing a number of them to entertain honest fears in the premises,

“The General Assembly of North Carolina do resolve, That, while we regard with repugnance the absurd attempts, by means of ‘Civil Rights’ Bills, to eradicate certain race distinctions, implanted by nature and sustained by the habits of forty centuries; and while we are sure that good government demands for both races alike that the great representation and executive offices of the country should be administered by men of the highest intelligence and best experience in public affairs, we do, nevertheless, heartily accord alike to every citizen, without distinction of race or color, equality before the law.

“Resolved, That we recognize the full purport and intent of that amendment to the Constitution of the United States which confers the right of suffrage and citizenship upon the people of color, and that part of the Constitution of North Carolina conferring educational privileges upon

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both races: that we are disposed and determined to carry out in good faith these as all other constitutional provisions."

STATE LEGISLATION AFTER 1883

In South

The civil rights legislation in the South after 1883 may be shortly disposed of, for an examination of the session laws of the Southern States since that time reveals only one statute that can at all properly be called a Civil Rights Bill. That was a statute of Tennessee³⁰ of March 25, 1885, providing against discrimination in theatres, shows, parks, places of public resort for observation of scenery or amusement of any kind whatever, where fee or toll is charged. But it adds this significant section: "That nothing herein contained shall be construed as interfering with the existing rights to provide separate accommodations and seats for colored and white persons at such places." It may be taken for granted that the Civil Rights Bills passed in the South by the Reconstruction administrations became inoperative, if they were not actually repealed, as soon as the government reverted to the hands of the resident white people. Of course, all the Southern legislation as to separate schools and separate accommodations in public conveyances relates to the civil rights of Negroes, and most of this has come since 1883, but the discussion of these two important subjects is postponed to later chapters.

In States Outside of South

The Federal Civil Rights Bill, as has been seen, was declared unconstitutional in 1883, and the national gov-

ernment was thereby declared impotent to secure for Negroes equality of accommodations in public places. Thus the burden, as has been said before, was thrown upon the States. Many of the States outside the South responded by adopting bills which practically copied the Civil Rights Bill of 1875. The following is a list of the States that have such Civil Rights Bills with the dates of their adoption and amendments: Connecticut,³¹ 1884 and 1905; Iowa,³² 1884 and 1892; New Jersey,³³ 1884; Ohio,³⁴ 1884 and 1894; Colorado,³⁵ 1885 and 1895; Illinois,³⁶ 1885; Indiana,³⁷ 1885; Massachusetts,³⁸ 1885, 1893, and 1895; Michigan,³⁹ 1885; Minnesota,⁴⁰ 1885, 1897, and 1899; Nebraska,⁴¹ 1885 and 1893; Rhode Island,⁴² 1885; New York,⁴³ 1893 and 1895; Pennsylvania,⁴⁴ 1887; Washington,⁴⁵ 1890; Wisconsin,⁴⁶ 1895; and California,⁴⁷ 1897. The Kansas⁴⁸ bill has already been considered.

A clearer idea of what the various State statutes mean and how they differ from the Civil Rights Bill of 1875 may be got from the accompanying table. The list contains the names of places where all citizens, without regard to race, color, or previous condition of servitude are guaranteed equality of accommodation. It will be noticed that none of the Southern States have Civil Rights Bills and, therefore, depend upon the courts to determine the rights of citizens in public places, and in addition the following States have no such statute: Delaware, Idaho, Maine, Maryland, Missouri, Montana, Nevada, New Hampshire, North Dakota, Oregon, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

ANALYSIS OF THE STATE CIVIL RIGHTS BILLS

	Inns	Taverns	Restaurants	Eating houses	Boarding houses	Cafes	Chop houses	Lunch counters	Hotels	Saloons	Soda fountains	Ice cream parlors	Bath houses	Barber shops	Theatres	Concerts	Music halls	Skating rinks	Bicycle rinks	Churches	Public meetings	Elevators	Public conveyances	State universities	State colleges	Schools of public instruction	Places of public instruction	Places of public accommodation	Places of public amusement	Places of public resort	Public places kept for hire, gain, or reward	Places where refreshments are served	Places of entertainment
1 California.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
2 Colorado.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
3 Connecticut...	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
4 Illinois.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
5 Indiana.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
6 Iowa.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
7 Kansas.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
8 Massachusetts.	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
9 Michigan.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
10 Minnesota.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
11 Nebraska.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
12 New Jersey...	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
13 New York.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
14 Ohio.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
15 Pennsylvania..	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
16 Rhode Island..	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
17 Washington....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
18 Wisconsin.....	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Total.....	16	1	13	11	1	1	1	1	6	2	1	2	4	13	14	2	1	3	1	1	1	1	1	17	1	1	1	11	18	2	1	2	3

x Indicates States in which equal accommodations are guaranteed to all without regard to race.

PENALTY FOR VIOLATING THE LAW

1. CALIFORNIA: Fine not less than \$50.
2. COLORADO: Forfeiture between \$50 and \$500; misdemeanor, fine between \$10 and \$300, or imprisonment not over one year.
3. CONNECTICUT: Double damages to person injured.
4. ILLINOIS: Forfeiture between \$25 and \$500; misdemeanor, fine not over \$500, or imprisonment not over one year.
5. INDIANA: Forfeiture not over \$100; misdemeanor, fine not over \$100, or imprisonment not over thirty days, or both.
6. IOWA: Misdemeanor.
7. KANSAS: Misdemeanor, fine between \$10 and \$1,000, and suit for damages.
8. MASSACHUSETTS: Forfeiture between \$25 and \$300; misdemeanor, fine not over \$300, or imprisonment not over one year, or both.
9. MICHIGAN: Misdemeanor, fine not over \$100, or imprisonment thirty days, or both.
10. MINNESOTA: Forfeiture of \$500 to aggrieved party; gross misdemeanor.
11. NEBRASKA: Misdemeanor, fine between \$25 and \$100 and costs.
12. NEW JERSEY: Forfeiture of \$500 to aggrieved party and costs; misdemeanor, fine between \$500 and \$1,000, imprisonment between thirty days and one year.
13. NEW YORK: Forfeiture between \$100 and \$500 to aggrieved party; misdemeanor, fine between \$100 and \$500, imprisonment between thirty days and ninety days, or both.
14. OHIO: Forfeiture between \$50 and \$500 to aggrieved party; misdemeanor, fine between \$50 and \$500, imprisonment between thirty days and ninety days.
15. PENNSYLVANIA: Misdemeanor, fine between \$50 and \$100.
16. RHODE ISLAND: Fine not over \$100.
17. WASHINGTON: Misdemeanor, fine between \$50 and \$300, imprisonment between thirty days and six months.
18. WISCONSIN: Not less than \$5 to aggrieved party; fine not over \$100, or imprisonment not over six months.

CIVIL RIGHTS OF NEGROES

The wording of all the statutes is essentially the same. Each provides that all citizens within the jurisdiction of the State, without regard to race, color, or previous condition of servitude, are entitled to the full and equal accommodations, advantages, facilities, and privileges of the various places mentioned. The offending party may be either indicted and fined or imprisoned, or he may be sued by the aggrieved party. In some States, an action by the State is a bar to an action by the party and *vice versa*. One who aids or abets in a discrimination against a person on account of race, color, or previous condition of servitude is punished to the same extent as the one actually committing the act.

Heretofore only legislative enactments, State and Federal, as to the civil rights of Negroes have been considered. It is well now to turn to the courts to see how the laws have been interpreted as regards various public places.

HOTELS

Only six States expressly forbid race distinctions in hotels. But it may be assumed that the sixteen States which mention inns mean to include hotels.

In 1876 a Negro minister applied for a room at a Philadelphia hotel and was refused accommodation, though one of the guests offered to share his room with him. At that time there was no law in Pennsylvania requiring hotel-keepers to receive colored persons; but the Federal court⁴⁹ held that the clerk might be liable under the Federal Civil Rights Bill of 1875.

In 1898 one Russ applied for a license to open a hotel

HOTELS

in Pennsylvania. In granting it, the court ⁵⁰ took the occasion to express its view on race distinctions in the following words: "A sober, respectable, and well-behaved colored man or woman is entitled under the law of Pennsylvania to be received in any house of entertainment and be treated in the same manner as any other guest. It is time that race discrimination ceased in this State. . . . No one objects any longer to his [the Negro's] presence in a public conveyance or place of entertainment; thus far the prejudice of race has been overcome; it is quite certain that the objection to his presence in a hotel or restaurant will also pass away as soon as his right under the law to be there is recognized in fact as it now is by the letter of the statute. . . . It would be vain to deny that some race prejudice still exists among us, but the law does not countenance it, and good citizens should strive to rise above it. We trust the effort will be made and that toleration and moderation will mark the conduct of both races."

In 1896 the members of the Indiana University football team went to the Nutt House in Crawfordsville, Indiana, for accommodation. One of the members of the team was a Negro. The clerk refused to take the Negro in with the rest of the guests, but offered to let him eat at the "ordinary." The Negro, being a minor, brought suit through his next friend, and the Indiana ⁵¹ court held that the Civil Rights Bill of the State could not be satisfied by separate accommodations.

There is no case of race discrimination in the hotels of Massachusetts that has reached the higher courts, but in April, 1896, the following resolution ⁵² was passed by the General Court of the State:

“Whereas, On the twenty-ninth day of January, eighteen ninety-six, the Reverend Benjamin W. Arnett, D.D., of Wilberforce, Ohio, senior bishop of the African Methodist Episcopal Church, president of the board of trustees of Wilberforce University, and member of many learned societies, was refused entertainment at certain reputable hotels in the city of Boston, because he was a colored man, in spite of the statute laws against discrimination on account of color; therefore,

“Resolved, That the senate and house of representatives of the Commonwealth of Massachusetts, in general court assembled, successors of those bodies which repeatedly elected Charles Sumner to the Senate of the United States, and for four years received messages from John A. Andrew, hereby express their severest reprobation of such discrimination and their firm conviction of the truth of the clause of the Declaration of Independence wherein all men are declared to be created equal; and it is further

“Resolved, That still more to be reprobated is the sentiment of any part of the public against any class of our fellow citizens whereby such discrimination is rendered possible, and that a vigorous campaign for statute rights by the persons most aggrieved will meet the hearty approval and coöperation of the two branches of the General Court.” This is very significant as showing the actual attitude of the hotels of Boston toward receiving Negroes. Whether the “vigorous campaign” was conducted one cannot tell; certainly no case appears to have reached the courts. And there is in Boston at present a Negro hotel.

The manager of the Lucerne Hotel in New York City in 1905, refused to lease a suite to a woman because she

RESTAURANTS

was a Jewess. It was a family hotel, containing small suites like those found in an ordinary apartment house, rented upon annual leases, transients not being solicited. The New York court ⁵³ held that it was not a hotel in the sense that the manager must receive all applicants without regard to race or color. Of course, this case did not concern the Negro, but the same principle is involved.

RESTAURANTS

Race discrimination in restaurants is prohibited by thirteen States; in taverns, by one; in eating-houses, by eleven; in boarding-houses, by one; in cafés, by one; in chop-houses, by one; and at lunch-counters, by one. These will be considered under the general head of restaurants.

In 1881 a Negro was refused accommodation in a restaurant in New York. At that time the laws of the State prohibited discrimination in inns. The restaurant-keeper argued as a defence in the suit that followed that the restaurant was not included in the term "inns." The court ⁵⁴ held that the legislature meant by "inn" a place that furnished both lodging and food to guests, that "restaurant" had no fixed legal meaning, and that the declaration was sufficient if it said "inn" and then explained it by calling it a restaurant.

A Negro went to a restaurant in Detroit in 1887 and asked for accommodation. The clerk told him that he could not be served on the restaurant side, but that he would be served if he went over on the saloon side. The colored man complained to the proprietor and was told that it was the rule of the house not to serve Negroes in

the restaurant room. The statute of Michigan required full and equal accommodation in restaurants. The court ⁵⁵ held that the statute would not be satisfied if the Negro were given as good accommodations but in a different room, saying: "In Michigan there must be and is an absolute, unconditional equality of white and colored men before the law. . . . Whatever right a white man has in a public place, the black man has also."

In 1897 a colored man went into a restaurant in Milwaukee, Wisconsin. After sitting at the table forty minutes without having his order taken, he complained, and was told that he was not served because he was colored. He left, and later brought suit. At the trial, it appeared that the discrimination was not with the sanction of the proprietor, that he had told the waiter to serve Negroes, that the waiter had refused to do so and was discharged therefor. Nevertheless, the court ⁵⁶ held that the proprietor was liable for the act of his servant, and gave compensatory damages to the Negro.

The next year, a restaurant keeper refused to accommodate a Negro in Lucas County, Ohio, and the court ⁵⁷ allowed the Negro to recover the penalty prescribed by the law. The case was decided on a question of evidence.

In 1905 a Negro was serving on the jury in a civil case in Iowa. The bailiff had arranged with a boarding-house to serve meals. When the Negro, along with the other jurors, went for his meals, the boarding-house keeper refused to allow him to sit at the same table with the others. It was not questioned that this was in violation of the Civil Rights Bill of the State if the boarding-house was an "eating-house" within the terms of the statute. The

BARBER-SHOPS

court⁵⁸ charged the jury that such an eating-house as would come within the statute must be a place where meals are served to anyone applying at the same prices charged to all, but that, if meals are served only in pursuance of a previous arrangement for particular individuals, rather than anyone who may apply, it is a private boarding-house and not within the statute.

BARBER-SHOPS

Thirteen States provide that barbers must serve all persons without regard to race or color.

In 1889 a barber in Lincoln, Nebraska, refused to shave a Negro because he was "colored." The Civil Rights Bill of that State mentions barbers. The court⁵⁹ held: "A barber, by opening a shop and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one, you were a slave or the son of a slave, therefore I will not shave you. Such prejudices are unworthy of our better manhood, and are clearly prohibited by the statute." Barber-shops were included within the provisions of the Massachusetts Civil Rights Bill in 1893, but, as a matter of fact, Negroes are not even now given the same accommodations as whites in barber-shops in Massachusetts.

The statute of Connecticut requires equality of service in "places of public accommodation." A barber refused to serve one Faulkner because he was a Negro, and the latter brought suit on the ground that a barber-shop is a place of public accommodation and, hence, within the Civil

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Rights Bill of the State. The court ⁶⁰ held that the barber-shop is not, in its nature, different from the places of business run for private gain, and that the common law has never recognized it as possessing the quality of a place of public accommodation, as a hotel, public conveyance, etc.

It may be added here that most of the cases have involved the point as to what are places of public accommodation or amusement or resort. If the place is mentioned in the Civil Rights Bill, it is, of course, within the prohibition, and it is a violation of the statute even to require separate accommodations, although equal in every other respect. But a vast deal of litigation has arisen out of instances of Negroes being denied accommodation in places considered public in their nature but which are not mentioned in the Civil Rights Bill of the State wherein the case arises.

BOOTBLACK STANDS

In the year 1901, Basso, a bootblack in the basement of one of the business houses of Rochester, New York, refused to serve Burks because the latter was a Negro. The law of New York, as has been seen, requires full and equal accommodations in hotels and "other places of public accommodation." The question, therefore, was: Is a bootblack stand a place of "public accommodation"? The municipal court of Rochester, in which Burks brought suit, gave judgment for him, thereby answering the question in the affirmative. The county court reversed the decision. The appellate division reversed the county court and sustained the municipal. The court of appeals ⁶¹ reversed the

BILLIARD-ROOMS

appellate division thereby sustaining the county court, saying: "A bootblackening stand may be said to be a place of public accommodation, like the store of a dry goods merchant, a grocer, or the proverbial 'butcher, baker, and candlestick maker'; but that is very far from placing it in the same category with the places specifically named in the statute. Inns, hotels, and public conveyances are places of public accommodation in the broadest sense, because they have always been denominated as such under the common law. Bath-houses and barber-shops are not to be regarded as included within the statute under the general phrase, 'and all other places of public accommodation.' There is no more relation between a bootblackening stand and a public conveyance than there is between a theatre or music-hall and a bath-house or barber-shop. There is, it is true, a superficial resemblance between the occupation of the barber and that of the bootblack, in the sense that both minister to the personal comfort and convenience of others; but the same argument could be extended far beyond the limits necessary to demonstrate that not 'all other places of public accommodation' are included by relation within the category of the things specifically enumerated in the statute."

BILLIARD-ROOMS

In Massachusetts in 1866, a certain Negro was refused, because of his race or color, the use of a billiard-room. At that time a statute of the Commonwealth required equal accommodation in public places of amusement. The Supreme Court ⁶² of Massachusetts, in which the Negro's case was finally heard, held that there was no proof that the

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room was licensed, and added: "It cannot be supposed that it was the intent of the legislature to prescribe the manner in which persons should use their own premises or permit others to use them, if they did not carry on therein an occupation or business, or suffer other persons to appropriate them to a purpose, which required a license in order to render such an appropriation lawful."

SALOONS

Only two States, Minnesota and Wisconsin, mention saloons in their Civil Rights Bills. And in Minnesota, they were not added till 1899, as a result of the following case: A Negro was denied accommodation in a saloon. At that time, the statute required equal accommodations in inns and "places of public resort, refreshment, accommodation, or entertainment." The court⁶³ of that State, in passing on the case, held that a saloon is not among the other "places of public refreshment." The court suggests that "or other" means "other such like" and includes only places of the same nature as those already mentioned specifically in the statute. About the Negro, the court said: "It is a well-known fact that, owing to an unreasonable race prejudice which still exists to some extent, the promiscuous entertainment of persons of different races in places where intoxicating drink are sold not infrequently result in personal conflicts, especially when the passions of men are inflamed by liquor. Hence the legislature might have omitted saloons for that reason." The next year the legislature answered otherwise by adding saloons to the Civil Rights Bill.

SODA FOUNTAINS

In 1899 a bar-keeper in Ohio charged a Negro thirty cents for a cocktail, the regular price to white customers being only fifteen cents. The Civil Rights Bill of Ohio did not mention saloons, but said "other places of public accommodation and amusement." The court ⁶⁴ held that saloons were not included, adding, in the same spirit as the Minnesota court: ". . . nor should we interpret this statute as encouraging a tariff which the clearly defined policy of the State discourages."

A statute of Louisiana ⁶⁵ of 1908 requires separate saloons for white and colored persons. The Louisiana court, ⁶⁶ in July, 1909, held that the sale of liquor to white and colored persons must not be conducted in the same building, and that the statute is not obeyed by providing separate bars in the same building. The saloon keeper had attempted to avoid paying taxes on two saloons by operating two bars in the same building.

In Atlanta, ⁶⁷ before State prohibition began, there were separate saloons for the white and colored people. An ordinance of Nashville, ⁶⁸ Tennessee, which went into effect July 7, 1907, required the segregation of the races in saloons.

SODA FOUNTAINS

The keeper of a soda fountain in Illinois in 1896 refused to sell cold drinks to a Negro. At that time the law required equal accommodation in inns and "all other places of accommodation and amusement." The court ⁶⁹ of that State held that a soda fountain is not such a place of accommodation or amusement. "Such a place," the court argued, "can be considered a place of accommo-

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dation or amusement to no greater extent than a places where dry goods or clothing, boots and shoes, hats and caps, or groceries, are dispensed. The personal liberty of an individual in his business transactions, and his freedom from restrictions, is a question of utmost moment, and no construction can be adopted by which an individual right of action will be included as controlled within a legislative enactment, unless clearly expressed in such enactment and certainly included within the constitutional limitation on the power of the legislature."

THEATRES

The question of the rights of Negroes in theatres has given rise to a number of judicial decisions. Fifteen States provide by statute that there shall be no race distinction in theatres. In 1873, the laws of Mississippi, under the Reconstruction government, declared that all persons, without distinction as to race, color, or previous condition of servitude, should have equal and impartial enjoyment of theatres. One Donnell, held in custody for refusing to pay a fine for violating this law by refusing to sell theatre tickets to two Negroes, petitioned for a writ of *habeas corpus*. The court ⁷⁰ held that the law was not unconstitutional, because it in no way appropriated private property to public use.

Two years later, in reply to a question whether it was a crime to refuse a Negro equal accommodations in a hotel, Judge Emmons in Tennessee charged the grand jury ⁷¹ that the Federal government had no right to require individual innkeepers, theatre managers, etc., to entertain Negroes.

THEATRES

In 1876 a Negro in Louisiana bought a ticket to a theatre, which he was not allowed to use on account of his color. He sued for five thousand dollars damages. The Constitution of that State, at the time, guaranteed equal accommodations in public places. The Louisiana court ⁷² held that this law "does not enumerate a mere abstraction, but it guarantees substantial rights." The Negro's claim was sustained, but the damages were reduced to three hundred dollars and costs. Both this and the Mississippi case arose in the South and were decided favorably to the rights of the Negro, but both came during the Reconstruction régime. Since then, no such case appears to have risen in the South.

In 1889 a Negro woman in Illinois, having been refused tickets to a theatre, had a white man buy them for herself and her husband. On presenting the tickets they were refused admission to seats in the theatre which the tickets called for. At the resulting trial, the proprietor offered to prove that he had, "in order to avoid collision between the races, adopted a rule (and that such rule was necessary) to the effect that the colored people should have one row to themselves in each part of the house, or as many rows as the tickets which they bought would call for." This evidence was rejected, the court ⁷³ holding that the Civil Rights Bill of Illinois could not be satisfied by separate accommodations.

Missouri has no Civil Rights Bill. A Negro, mistaken for a white man by the clerk in the box-office, bought tickets for seats in the orchestra of a Kansas City theatre. When he presented his tickets to the usher he was refused the seats called for, but was offered in exchange balcony

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seats reserved for Negroes. The court ⁷⁴ before which the case was tried held that the rule of the theatre requiring separate accommodations for the races was not a violation of the Fourteenth Amendment.

The most recent case ⁷⁵ appears to be a 1905 case in New York in which a Negro was ejected from a theatre by an employee. The proprietor was permitted to show that the ejection was done while he was away and contrary to his orders, and that he permitted Negroes to enjoy the privileges of the place. A verdict was thereupon found for him, but the case was remanded by the appellate court for a new trial, on the ground that the evidence was improperly admitted.

SKATING RINKS

California, Illinois, and Massachusetts have considered skating rinks of enough importance to include them in their Civil Rights Bills. In 1885 the keeper of a skating rink in Iowa refused to let a Negro use it, and the Negro brought suit. The court ⁷⁶ held that the exclusion of a colored man from a skating rink not licensed is not illegal. The New York court ⁷⁷ has held that a skating rink is a "place of public amusement" within the meaning of the statute, so that a keeper of one cannot refuse admission to a Negro.

CEMETERIES

The early Civil Rights Bills of New York, Florida, and Kansas prohibited race distinctions in public cemeteries. This stipulation, however, does not appear in the present statutes of any of the States, except Kansas. Race dis-

CEMETERIES

tinctions in cemeteries are common. The legislature of Mississippi⁷⁸ of 1900, for instance, gave the Ladies' Auxiliary Cemetery Association, an organization of white women, permission to remove the monument and remains of the Negro State Secretary of State, James Lynch, from the white to the Negro cemetery in Jackson, Mississippi, provided it was done without expense to the State.

The Raleigh, N. C., *News and Observer* of February 20, 1906, quotes the Germantown, Pa., *Guide* as calling on the people to provide a cemetery where Negroes may be buried, saying that "unless something is done, the bodies of the colored poor will be denied the right of decent burial, for their disposal, of necessity, will be by means of the dissecting rooms of anatomical boards."

The Civil Rights Bills of the eighteen States have now been analyzed, and the judicial decisions arising therefrom have been considered. It is noticeable that, if one excepts the theatre cases of the Reconstruction period, not a case has come from a Southern State. The explanation must be that those States have never undertaken to require hotel-keepers, etc., to offer accommodations without regard to color: the Negroes have taken for granted that they would not be admitted to such places, except upon condition that they would accept the accommodations set apart for their race, and consequently have not applied for admission upon any other terms. In the other States the courts have, as a rule, interpreted the Civil Rights Bills very strictly. If a place is not specifically mentioned in the statute, courts have been very slow to include it under the general head of "other places of amusement or accommodation." In

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other words, this phrase, which is, in substance, tacked on to every statute, is a dead letter. The courts are chary, as they should be, of invading individual liberty and freedom of business. But if a place is specifically mentioned in the statute, the law is not satisfied by offering separate accommodations to Negroes, even though such accommodations are equal for both races in every respect; they must be identical.

RACE DISCRIMINATION BY INSURANCE COMPANIES

Some allied topics may be properly discussed under the general head of civil rights.

Five States—Connecticut,⁷⁹ Massachusetts,⁸⁰ Ohio,⁸¹ New York,⁸² and Michigan,⁸³—have deemed it necessary to pass laws prohibiting any discrimination on account of race or color by life insurance companies. All of the statutes are essentially the same. They declare that no life insurance company shall make any distinction or discrimination between white and colored persons wholly or partly of African descent, as to premiums or rates charged for policies; nor shall such company demand higher premiums from colored persons than from whites of the same age, sex, general condition of health, and hope of longevity; nor shall it make or require any rebate, diminution, or discount upon the sum to be paid on the policy in case of the death of the colored person. Such a company is forbidden to add any stipulation by which the insured binds himself, his heirs, executors, assigns, etc., to accept any sum less than the face value of the policy. Massachusetts provides that if a company refuses to insure a colored person making

RACE DISCRIMINATION BY INSURANCE COMPANIES

application, it must, upon his request, give him a certificate of the regular examining physician, saying that the refusal was not because the applicant is a person of color, but solely upon the grounds of general health and prospect of longevity as would be applicable to white persons of the same age and sex.

The Connecticut statute enacts that any condition or stipulation in the policy, inserted because of the color or race of the insured, shall be void. Ohio provides that any corporation, or officer or agent of such corporation, violating the provisions of its statute, shall be fined for each offence not less than one hundred dollars nor more than two hundred dollars, but that nothing in the act shall be construed as to require any agent or company to take or receive the application for insurance of any person. New York makes the violation of the law a misdemeanor punishable by a fine of from fifty dollars to five hundred dollars. Michigan goes a step further and declares that anyone violating the law shall forfeit to the State five hundred dollars, to be recovered by the attorney general, and that any officer or agent who violates it shall be guilty of a misdemeanor and punished by imprisonment in the county jail not over one year or by a fine of from fifty dollars to five hundred dollars, or both.

There must have been instances of discrimination by life insurance companies against Negroes, else these States would not have thought it necessary to enact such statutes. The explanation of this discrimination is probably not so much race prejudice as the general belief, based upon statistics, that the Negro, particularly in the colder climate of the North and West, has not the same hope of longevity

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as the white man, being more subject to pulmonary and other mortal diseases. If the risk of mortality of the Negro is greater, the insurance company argued that it was justified in seeking compensation for assuming this increased risk by charging a higher premium. No case has been found arising under these statutes.

RACE DISCRIMINATIONS BY LABOR UNIONS

The attitude of labor organizations toward Negroes has of late been the subject of much comment, especially by the Negroes themselves, who complain that they are handicapped in the struggle for existence because of the hostility of such organizations. Mr. Baker,⁸⁴ speaking of the North, said: "And yet, although I expected to find the Negro wholly ostracised by union labor, I discovered that where the Negro becomes numerous or skilful enough, he, like the Italian or Russian Jew, begins to force his way into the unions. . . . They have got in, . . . not because they are wanted, or because they are liked, but because, by being prepared, skilled, and energetic, the unions have had to take them in as a matter of self-protection. . . . In several great industries North and South, indeed, the Negro is as much a part of labor unionism as the white man." There seems to be more opposition to Negroes joining the unions of Philadelphia than most Northern cities.⁸⁵

One would expect to find, where the conflict between white and colored laborers exists, some evidence of it in statutes or court reports. But this resolution of the General Court of Massachusetts,⁸⁶ passed in 1904, is the only

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trace that has been found: “ *Whereas*, the national league of American wheelmen, at their convention held in Louisville, Kentucky, on the twentieth day of February, in the present year, voted to exclude colored persons from membership in said organization, which exclusion affects the members of the organization resident in Massachusetts; *Resolved*, That the General Court deprecates the action of the organization above referred to, and regards the enforcement of discriminations of this character as a revival of baseless and obsolete prejudices.”

CHURCHES

Colorado is the only State that has undertaken by legislation to guarantee to Negroes full and equal accommodations in churches. The rest have left it to the churches themselves to decide the matter.

It is generally known that during slavery the Negroes, for the most part, attended the white churches, where galleries were set apart for them, were members thereof, and were served by white ministers. After Emancipation, the Negroes withdrew from the white churches and built places of worship of their own. To-day, in all parts of the country, where Negroes live in considerable numbers, they have their own churches. In such cities as Boston, where the doors of all churches are in theory open to every race, Negro churches are found in the Negro districts.

Although there is practically race separation in the churches of the whole country, all the difficulties have not been solved. In 1903, the Freedman's Aid and Southern Educational Society, an organization of the bishops of the

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Methodist Episcopal Church, general secretaries of the church department, and leading laymen, met in session in Lincoln, Nebraska. Inasmuch as the purpose of this body was to devise and discuss means of improving the educational opportunities of the Southern Negroes, the churchmen of that race were present in good numbers. Some of the hotels in the city gave notice that they could not allow the colored delegates to eat in the main dining rooms, but that they could furnish them sleeping accommodations and serve them meals in their apartments.⁸⁷ It is along this line that the difficulty usually comes.

The Baptist denomination recently organized the General Baptist Convention of America, which held its first meeting in St. Louis in 1905. The next meeting was to have been in Louisville, Kentucky, May 5 and 16, 1906. The executive committee of the convention postponed the meeting for a year, assigning as their reason, or one of their reasons, the fact that they experienced difficulty in securing a church in which to hold the convention, the white Baptists being averse to having the colored members of the denomination assemble with them. It was arranged later that the whites and Negroes should meet in the same edifice, but that the Negroes should be restricted to the use of the balconies. This, however, was resented by the Negroes.⁸⁸

The Presbyterian Church also has had to face the race problem. In its general assembly at Des Moines, Iowa, in 1906, the committee on church policies recommended the erection of a synod in Alabama to include the presbyteries of Birmingham, Levere, and Rogersville, which are composed of colored churches. They had hitherto been included in the synod of Tennessee. The report provoked

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such a discussion that it was carried over to the next meeting, and no subsequent account has appeared.⁸⁹ At the general assembly of 1908, held in Pittsburg, Pennsylvania, the question arose again out of a report of the Board of Freedmen's Missions, some of the members from the North representing such a separation in the missionary efforts.⁹⁰

The Episcopal Church has probably had the most difficulty with the race problem. This Church has had no separate organization for Negroes. Both races meet together in the annual diocese conventions, without distinction, and participate in the business of the Church. At one of these conventions, held at Tarboro, North Carolina, in 1907, the following resolution was passed: "That the time has come when the welfare of both races in the Southern States requires that each race should have its own ecclesiastical legislative assemblies, and that we urge the General Convention to take immediate action." The colored clergy and congregations had already expressed their willingness to submit the whole matter to the general convention. In speaking for separation, Bishop Cheshire, of North Carolina, said: "I have come to this conclusion in spite of the sentiments and convictions of a life-time, and though my mind and conscience compel my assent to this necessity, my heart still clings to the old ideal of a church and a diocese which in its annual gatherings should represent visibly the oneness of all races and colors in Christ. . . . We must confront the actual facts of the day. I believe that, in one way or another, both the white race and the colored race, consciously or unconsciously, demand a different arrangement of our ecclesiastical institutions. I believe that some separate organization for our colored work is coming

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in the near future.”⁹¹ At the general convention, which met in Richmond, Virginia, in October, 1907, the question of the separation of the races was much discussed, but the actual outcome has not been learned. It developed in the debate that the Southern bishops desired separation, wishing to be relieved of the burden of the Negroes in their dioceses, while the bishops from other sections preferred the present arrangement, not desiring to be burdened with a class of people not in their dioceses.⁹²

The Young Men's Christian Associations of the Northern cities have to meet the problem of the Negro. The New Haven, Connecticut, people refused to permit Negroes to attend the Y. M. C. A., and a separate building had to be provided for them.⁹³

Within the colored church itself there is manifest a conflict between the Negroes proper and mulattoes. There is a town in North Carolina in which they have practical separation in the churches, the black Negroes going to one church and the bright mulattoes to another. A similar separation of the Negroes and mulattoes in churches exists, to some extent, in Charleston, South Carolina. At a Negro Christian Congress at Washington City, in 1906, the chairman of the meeting was charged with removing from the program dark-skinned men and substituting light-skinned men. It provoked such a discussion as to divide the meeting into two factions.⁹⁴

NEGROES IN THE MILITIA

The Brownsville affair—that is, the dismissal without honor, through the order of President Roosevelt, of a whole regiment of Negro soldiers because of the miscon-

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duct of some of them and the refusal of the others to testify against the guilty ones, and the championship of the cause of the Negroes by Senator Foraker—has brought into much prominence the question of the Negro as a soldier.

The Southern States have been and are unfavorable to allowing Negroes to serve in the militia. South Carolina,⁹⁵ in 1865, declared that persons of color constituted no part of the militia of the State. Arkansas,⁹⁶ in 1867, accorded to Negroes all the rights of white citizens, with a few exceptions, one of which was that nothing in the statute should be construed as modifying any statute or common law usage in the State respecting the service of Negroes in the militia. North Carolina⁹⁷ provided that white and colored members of the detailed militia should not be compelled to serve in the same companies. Georgia,⁹⁸ in 1905, by statute, abolished the colored troops of the State, active and retired, and discharged the officers and men from the military service of the State.

There is very little legislation on the subject in the other States. In 1879, the legislature of Connecticut⁹⁹ authorized the commander-in-chief of the State militia to organize four independent Negro companies of infantry to be part of the National Guard. West Virginia,¹⁰⁰ in 1889, provided that, if any colored troops should be organized, they should be enlisted and kept separate and apart from the other troops, and should be formed into separate companies and regiments. New Jersey,¹⁰¹ in 1895, made provision for four companies of colored infantry, presumably meaning that they should be all colored and kept separate from the other troops.

CIVIL RIGHTS OF NEGROES

SEPARATION OF STATE DEPENDENTS

The Southern States, as a rule, require a separation by race of inmates of State charitable and penal institutions, and where it is not provided for by statute, it is done as a matter of custom. Alabama,¹⁰² for instance, makes it unlawful for any jailer or sheriff, having charge of white and colored prisoners before conviction, to imprison them permanently together in the same apartments of the jail or other places of safe-keeping, if there are enough separate apartments. It is also unlawful¹⁰³ for white and colored convicts to be chained together, allowed to sleep together, or confined in the same room or apartment when not at work.

The legislature of Arkansas¹⁰⁴ passed a statute in 1903, directing that in the State penitentiary and in all county jails, stockades, convict camps, and all other places where prisoners are confined, separate apartments should be provided and maintained for white and Negro prisoners. Separate bunks, beds, bedding, dining tables, and other furnishings were required, and after they had once been assigned to a prisoner of one race they must not be changed to the use of one of the other race. White prisoners must not be handcuffed or otherwise chained or tied to a Negro prisoner.

Georgia¹⁰⁵ does not allow prison-keepers, or firms leasing or controlling convicts, to confine white and colored convicts together, or to work them chained together, or to chain them together in going to and from their work or at any other time. Mississippi¹⁰⁶ provides that no discrimination shall be made on account of race, color, or previous

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condition, in working convicts. This does not mean that they shall not be separated, as they are in Georgia, but is simply a prohibition against discrimination in the quality of work assigned to the two races. At the last session of the legislature of North Carolina,¹⁰⁷ a bill was passed providing for the separation of white and colored prisoners in the State penitentiary and in the State and county convict camps during sleeping and eating hours.

That a separation of the two races exists in the jails of Washington City is evidenced by a protest issued a year or so ago by the National Equal Rights Council of that city, a Negro organization, against the separation of the white and colored prisoners in the jails of the city. There was no allegation, however, that the cells were not equal in accommodation, the objection being raised solely at the principle of separation.¹⁰⁸

As to reformatories, Georgia¹⁰⁹ provides that they shall be so constructed as to keep white and colored inmates separate. West Virginia¹¹⁰ requires that the white and colored inmates of its reform school for boys shall be kept separate, and the inmates of its industrial home for girls (also a reformatory) shall be separate as far as practicable.

As to paupers, Alabama¹¹¹ authorizes the county commissioners of Washington County to keep separate accommodations for the maintenance of white and colored paupers.

Not many States have statutes which say in so many words that lunatics, and that the deaf, mute, and blind shall be kept separated according to race; but one finds

appropriations for colored asylums and schools, etc., and one is justified in concluding that, where a colored asylum or school is built, the colored persons are not allowed in the other asylums and schools of the State. Alabama,¹¹² for instance, has a school for the Negro deaf and blind at Talladega, under the control and management of the board of trustees of the white school for the deaf, and makes an annual appropriation for the support of the school. Arkansas¹¹³ also provides that applicants to the deaf-mute asylums shall be received without restriction on account of race or color, but does not forbid their separation by race within the asylum. Tennessee,¹¹⁴ as early as 1866, provided that there should be separate asylums for the colored blind, deaf and dumb, and lunatics, and the trustees of these institutions were given power to prepare buildings for colored insane, "so as to keep them secure and safe, and yet separate and apart from the white patients." In 1881, that State¹¹⁵ appropriated \$25,000 to provide accommodations for the colored blind at Nashville, and the same amount for the colored deaf and dumb at Knoxville. Kentucky¹¹⁶ likewise provided in 1876 that white and colored lunatics should not be kept in the same building. New York¹¹⁷ has on many occasions made appropriations for asylums for colored children, thus leaving the impression that such children are not admitted to the white asylums. North Carolina¹¹⁸ maintains separate asylums for its white and colored insane. And Georgia¹¹⁹ requires the asylums of the State to provide apartments for the insane Negro residents of the State. Indiana,¹²⁰ in 1879, made an appropriation to associations formed for the purpose of maintaining an asylum for col-

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ored orphan children. The West Virginia¹²¹ asylum for insane must have separate wards for white and colored patients.

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¹ Bouvier's "Law Dictionary," I, p. 331.

² 14 Stat. L. 27, chap. 31.

³ Flack, "The Adoption of the Fourteenth Amendment," pp. 46-50.

⁴ *Bowlin v. Com.*, 1867, 65 Ky. (2 Bush) 5.

⁵ Fed. Case No. 16,151 (1866).

⁶ Fed. Case No. 14,247 (1867).

⁷ "The Adoption of the Fourteenth Amendment," pp. 53-54.

⁸ *Ibid.*, p. 94.

⁹ 16 Stat. L. 144, chap. 114.

¹⁰ 16 Wall, 36, at pp. 71-72 (1872).

¹¹ 18 Stat. L. 335, chap. 114.

¹² Fed. Case No. 18,258 (1875).

¹³ Fed. Case No. 18,260 (1875).

¹⁴ Civil Rights Cases, 1875, 109 U. S. 3, at pp. 24, 11, and 13.

¹⁵ Acts and Resolves of Mass., 1864-65, p. 650.

¹⁶ *Ibid.*, Jan. sess., 1866, p. 242.

¹⁷ Del. Laws, 1871-73, pp. 686-87.

¹⁸ *Ibid.*, 1875-77, chap. 194.

¹⁹ Laws of Kan., 1874, chap. 49, sec. 1.

²⁰ N. Y. Stat. L., IX, pp. 583-84.

²¹ Laws of N. Y., 1881, I, p. 541.

²² Laws of Fla., 1865, p. 25.

²³ *Ibid.*, 1873, chap. 1947.

²⁴ Acts of La., 1869, p. 57. See also Acts of La., 1870, p. 57.

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- ²⁵ *Ibid.*, 1873, pp. 156-57.
- ²⁶ Acts of Ark., 1873, pp. 15-19.
- ²⁷ Laws of Tenn., 1875, pp. 216-17.
- ²⁸ 9 Baxter, 584.
- ²⁹ Laws of N. C., 1876-77, pp. 589-90.
- ³⁰ Laws of Tenn., 1885, pp. 124-25.
- ³¹ Revision, 1902, sec. 1164; Pub. Acts of Conn., 1905, p. 323.
- ³² Annotated Code, 1897, sec. 5008.
- ³³ General Stat., 1709-1895, I, p. 804.
- ³⁴ Laws of O., 1884, pp. 15-16; 1894, pp. 17-18; Bates's Annotated Stat. (Everett's 6th Ed.) II, p. 2469.
- ³⁵ Revised Stat., 1908, secs. 609-10; Laws of Colo., 1895, pp. 139-40.
- ³⁶ Laws of Ill., 1885, pp. 64-65; Jones and Addington's Supplement, 1902, IV, p. 395.
- ³⁷ Burns's Annotated Stat., 1908, II, secs. 3863-65.
- ³⁸ Acts and Resolves of Mass., 1885, p. 774; 1893, p. 1320; 1895, p. 519.
- ³⁹ Compiled Laws, 1897, III, sec. 11,759, p. 3495.
- ⁴⁰ Laws of Minn., 1897, p. 616; 1899, chap. 41; Revised Laws, 1905, sec. 2812.
- ⁴¹ Compiled Stat., 1907, secs. 1932-33, p. 501.
- ⁴² Laws of R. I., 1884-85, p. 171; General Laws of R. I., 1896, p. 978.
- ⁴³ Laws of N. Y., 1893, II, p. 1720; 1899, II, p. 1556; Consolidated Laws of N. Y., 1909, I, pp. 626-27.
- ⁴⁴ Laws of Pa., 1887, pp. 130-31.
- ⁴⁵ Cotton and Ballinger's Annotated Codes and Stat., II, secs. 7069-70, p. 1953.
- ⁴⁶ Stat., 1898, II, pp. 2676-77, sec. 4398 c.
- ⁴⁷ Civil Code, 1906, pp. 29-30.
- ⁴⁸ General Stat., 1905, secs. 2507-08.

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- ⁴⁹ U. S. v. Newcomer, 1876, Fed. Case No. 15,868.
- ⁵⁰ Russ's Application, 1898, 20 Pa. Co. Ct. Rep. 510.
- ⁵¹ Furchey v. Eagleson, 1896, 43 N. E. 146.
- ⁵² Acts and Resolves of Mass., 1896, pp. 659-60.
- ⁵³ Alsberg v. Lucerne Hotel Co., 1905, 46 Misc. Rep. (N. Y.) 617.
- ⁵⁴ Lewis v. Hitchcock, 1882, 10 Fed. 4.
- ⁵⁵ Ferguson v. Gies, 1890, 82 Mich. 358; 46 N. W. 718.
- ⁵⁶ Bryan v. Adler, 1897, 72 N. W. 368.
- ⁵⁷ De Veaux v. Clemmons, 1898, 17 O. Cir. Ct. Rep. 33.
- ⁵⁸ Humburd v. Crawford, 1905, 105 N. W. 330.
- ⁵⁹ Messenger v. State, 1889, 25 Neb. 674.
- ⁶⁰ Faulkner v. Salozzi, 1907, 79 Conn. 541.
- ⁶¹ Burks v. Basso, 1905, 73 N. E. 58.
- ⁶² Com. v. Sylvester, 1866, 95 Mass. (13 Allen) 247.
- ⁶³ Rhone v. Loomis, 1898, 74 Minn. 200; 77 N. W. 31.
- ⁶⁴ Kellar v. Koerber, 1899, 55 N. E. 1002.
- ⁶⁵ Acts of La., 1908, p. 236.
- ⁶⁶ State *ex rel.* Tax Collector v. Falkenheimer, 1909, 49 So. 214.
- ⁶⁷ Baker, "Following the Colour Line," p. 36.
- ⁶⁸ Nashville, Tenn., *Weekly Journal and Tribune*, Feb. 2, 1907.
- ⁶⁹ Cecil v. Green, 1896, 161 Ill. 265; 43 N. E. 1105.
- ⁷⁰ Donnell v. State, 1873, 12 Am. Rep. 375; 46 Miss. 661.
- ⁷¹ Fed. Case No. 18,260 (1875).
- ⁷² Joseph v. Bidwell, 1876, 28 La. Ann. 382.
- ⁷³ Baylies v. Curry, 1889, 128 Ill. 287.
- ⁷⁴ Younger v. Judah, 1892, 19 S. W. 1109.
- ⁷⁵ Thomas v. Williams, 1905, 95 N. Y. Sup. 592.
- ⁷⁶ Bowlin v. Lyon, 1885, 67 Ia. 536.
- ⁷⁷ People v. King, 1886, 42 Hun. 186; affirmed in 110 N. Y. 418.

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- ⁷⁸ Laws of Miss., 1900, p. 171.
- ⁷⁹ Revision, 1902, sec. 3535.
- ⁸⁰ Revised Laws, 1902, II, p. 1153.
- ⁸¹ Laws of O., 1889, pp. 163-64.
- ⁸² Laws of N. Y., 1891, p. 288.
- ⁸³ Pub. Acts of Mich., 1893, pp. 60-61.
- ⁸⁴ "Following the Colour Line," p. 135.
- ⁸⁵ *Ibid.*, pp. 142 and 160.
- ⁸⁶ Acts and Resolves of Mass., 1894, p. 825.
- ⁸⁷ Lincoln, Neb., *Star*, Nov. 7, 1903.
- ⁸⁸ Raleigh, N. C., *News and Observer*, April 6, 1906.
- ⁸⁹ Norfolk, Va., *Landmark*, May 27, 1906; Raleigh, N. C., *News and Observer*, May 29, 1906.
- ⁹⁰ Raleigh, N. C., *News and Observer*, June 3, 1908.
- ⁹¹ *Ibid.*, May 19 and 26, 1907.
- ⁹² *Ibid.*, Oct. 9 and 20, 1907.
- ⁹³ *Ibid.*, March 18, 1906.
- ⁹⁴ Richmond, Va., *News-Leader*, Aug. 3, 1906.
- ⁹⁵ Laws of S. C., 1865, p. 275.
- ⁹⁶ Laws of Ark., 1866-67, p. 99.
- ⁹⁷ Pub. Laws of N. C., 1868, p. 35.
- ⁹⁸ Laws of Ga., 1905, p. 166.
- ⁹⁹ Pub. Acts of Conn., 1879, pp. 377-78; 1883, p. 289.
- ¹⁰⁰ Laws of W. Va., 1889-90, p. 87.
- ¹⁰¹ Laws of N. J., 1895, p. 274.
- ¹⁰² Laws of Ala., 1875-76, p. 285; repeated in the Code of 1876, sec. 4321, p. 915.
- ¹⁰³ *Ibid.*, 1884-85, p. 192; Code, 1896, II, p. 210.
- ¹⁰⁴ Acts of Ark., 1903, p. 161.
- ¹⁰⁵ Laws of Ga., 1890-91, I, p. 213.
- ¹⁰⁶ Laws of Miss., 1872, p. 85.
- ¹⁰⁷ Laws of N. C., 1909, p. 1215.
- ¹⁰⁸ Raleigh, N. C., *News and Observer*, July 21, 1907.

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¹⁰⁹ Laws of Ga., 1893, p. 121.

¹¹⁰ Laws of W. Va., 1889, p. 15; Code, 1906, pp. 770 and 776.

¹¹¹ Local Acts of Ala., 1898-99, p. 86.

¹¹² Code, 1907, II, secs. 1949-52.

¹¹³ Code, 1874, sec. 384; 1884, sec. 2505, p. 572.

¹¹⁴ Laws of Tenn., 1865-66, pp. 5 and 65.

¹¹⁵ *Ibid.*, 1881, p. 139.

¹¹⁶ Laws of Ky., 1876, I, p. 112.

¹¹⁷ Laws of N. Y., 1866, II, p. 1675; 1867, II, p. 1850; 1868, II, pp. 1845-49; 1869, II, pp. 2064-66; 1870, II, pp. 1689-90, etc.

¹¹⁸ Laws of N. C., 1874-75, pp. 338-39.

¹¹⁹ Laws of Ga., 1885, p. 399.

¹²⁰ Code, 1901, II, sec. 4598.

¹²¹ Code, 1906, sec. 2699, p. 1104; Laws of W. Va., 1897, p. 42; 1904, p. 160.

CHAPTER VIII

SEPARATION OF RACES IN SCHOOLS

BEREA COLLEGE AFFAIR

THREE incidents, occurring during the past six years under widely varying circumstances and in far separated localities, have brought the question of the separation of the white and colored races in schools into much prominence.

On the 22d of March, 1904, the legislature of Kentucky¹ enacted the following statute:

"Sec. 1. That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and Negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school or institution shall be fined one thousand dollars, and any person or corporation who may be convicted of violating the provisions of this act shall be fined one hundred dollars for each day they may operate said school, college or institution after such conviction.

"Sec. 2. That any instructor who shall teach in any school, college or institution where members of said two races are received as pupils for instruction shall be guilty

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of operating and maintaining same and fined as provided in the first section hereof.

“Sec. 3. It shall be unlawful for any white person to attend any school or institution where Negroes are received as pupils or receive instruction, and it shall be unlawful for any Negro or colored person to attend any school or institution where white persons are received as pupils, or receive instruction. Any persons so offending shall be fined fifty dollars for each day he attends such institution or school: Provided, That the provisions of this law shall not apply to any penal institution or house of reform.

“Sec. 4. Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty-five miles distant, for the education exclusively of one race or color.

“Sec. 5. This act shall not take effect, or be in operation before the fifteenth day of July, Nineteen Hundred and Four.”

This law was general in its terms, requiring, under heavy penalty, the separation of the white and colored races in all schools of the State, private as well as public. But at the time of the consideration of the bill, the legislators probably knew that there was only one school in the State which admitted both white and colored students. That was Berea College, which had been established about fifty years before for the purpose of “promoting the cause of Christ” and of giving general and nonsectarian instruction to “all youth of good moral character.” It was primarily for the benefit of the mountain whites of Kentucky,

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Tennessee, Virginia, and the Carolinas. After the Civil War, the doors of the school had been opened to Negroes, and in 1904, Berea had a student-body of nine hundred and twenty-seven, of whom one hundred and seventy-four were Negroes.² The President and Trustees of the college protested against the enactment of the above law, but to no avail. When the session of 1904-5 began, the colored students were refused admission. The college at once took steps to aid these Negro youths. It bore the transportation expenses of about a hundred of them to Fiske University, Knoxville College, Hampton Institute, and other distinctly colored schools. The white students left behind gave to the colored students leaving Berea the following expression of their regard for them:

“Friends and Fellow-Students: As we meet for the first time under new conditions to enjoy the great privileges of Berea College, we think at once of you who are now deprived of these privileges. Our sense of justice shows us that others have the same rights as ourselves, and the teaching of Christ leads us to ‘remember them that are in bonds as bound with them.’

“We realize that you are excluded from the class rooms of Berea College, which we so highly prize, by no fault of your own, and that this hardship is a part of a long line of deprivations under which you live. Because you were born in a race long oppressed and largely untaught and undeveloped, heartless people feel more free to do you wrong, and thoughtless people meet your attempts at self-improvement with indifference or scorn. Even good people sometimes fear to recognize your worth, or take your part

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in a neighborly way because of the violences and prejudices around us.

“We are glad that we have known you, or known about you, and that we know you are rising above all discouragements, and showing a capacity and a character that give promise for your people. . . . And you will always have our friendship, and the friendship of the best people throughout the world. We hope never to be afraid or ashamed to show our approval of any colored person who has the character and worth of most of the colored students of Berea. We are glad that the college is providing funds to assist you in continuing your education, and we are sure the institution will find ways in which to do its full duty by the colored race.”³

As might have been expected, the statute separating the races in schools aroused much comment throughout the country, the northern and eastern press being, as a rule, hostile to it, the southern press coming to its defence. Haste was made to have a test case involving the constitutionality of the law heard. On June 12, 1906, the Kentucky Court of Appeals in the case of *Berea College v. The Commonwealth*⁴ upheld its constitutionality, being of opinion that the law in question did not violate the Bill of Rights of the State Constitution, because the requirement of separation was a reasonable exercise of the police power of the State, and did not violate the Fourteenth Amendment by depriving Berea College of its property without due process of law, because the right to teach white and colored children in a private school at the same time and place was not a property right, but the court added that that part of the statute requiring a separate school for the other

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race, if established, to be at a distance of not less than twenty-five miles, was unreasonable. The court took the position that the white and black races are naturally antagonistic, and that the enforced separation of the children in schools is in line with the preservation of the peace.

The Supreme Court of the United States,⁵ on November 9, 1908, affirmed the opinion of the State court. Mr. Justice Brewer, however, placed his decision upon the ground that the legislature has a right, by express reservation, to amend the charter so long as the amendment does not defeat or substantially impair the object of the grant under the charter. Mr. Justice Harlan, in a dissenting opinion, said the court should meet the entire question squarely and decide whether it is a crime under any conditions to educate white children and Negro children at the same institution. He said that the Kentucky statute was void as an arbitrary invasion of the rights of liberty and property granted by the Fourteenth Amendment against unauthorized State action. "Have we," he asked, "become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinction between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races? Further, if the lower court be right, then a State may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mis-

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chievous, not to say cruel, character of the statute in question, and how inconsistent such legislation is with the great principle of the equality of citizens before the law." Mr. Justice Harlan added that he did not wish to be understood as criticising the system of separate public schools for the races, but that his censure was directed at the penal provision of the Kentucky law involved in this case, which he considered unconstitutional, and so vitiating the whole statute.

EXCLUSION OF JAPANESE FROM PUBLIC SCHOOLS OF SAN FRANCISCO

The second incident, which opened the question of the separation of the races in schools and which led to international comment, was the exclusion of the Japanese children from the public schools of the city of San Francisco. A law was enacted by the California Legislature ⁶ on March 12, 1872, which provided that school trustees should have the power to establish separate schools for Indian children and for the children of Mongolian and Chinese descent, and, when separate schools were furnished, to keep Indian, Mongolian, and Chinese children from attending any other school. The law was amended ⁷ in 1880, 1885, 1891, 1893, 1895, and 1903, but the provision for separation of the races remained essentially unchanged. This law was not enforced until 1901, when the labor vote became predominant. Then, according to Secretary Metcalf,⁸ who investigated the conditions, the labor unionists began a crusade to exclude the Japanese laborers from California, as the Chinese had already been excluded. On May 6,

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1905, the Board of Education of San Francisco passed the following resolution:

“That the Board of Education is determined in its efforts to effect the establishment of separate schools for Chinese and Japanese pupils, not only for the purpose of relieving the congestion at present prevailing in our schools, but also for the higher end that our children should not be placed in any position where their youthful impressions may be affected by association with pupils of the Mongolian race.” On October 1, 1906, the Board took the next step and adopted this resolution: “That in accordance with Article X, Section 1662, of the school law of California, principals are hereby directed to send all Chinese, Japanese or Korean children to the Oriental Public School, situated on the south side of Cary street between Powell and Mason streets, on and after Monday, October 15, 1906.”

On the day the latter rule went into effect there were 28,736 school children in San Francisco, of whom ninety-three were Japanese distributed in twenty-three primary and grammar schools of the city⁹ and nearly half the Japanese children were in two of the twenty-three schools. When the primary schools, except the Oriental, were closed to the Japanese children the Japanese residents became indignant. They appealed to their consul, and he, to their ambassador at Washington. The latter, in turn, called on the President, reporting the matter at the same time to the home government. Alarmists began to talk of war with Japan. President Roosevelt dispatched Secretary Metcalf to California to make investigations. To use the President's words, “I authorized and directed Secretary Met-

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calf to state that if there was failure to protect persons and property, then the entire power of the Federal government within the limits of the Constitution would be used promptly and vigorously to enforce the observance of our treaty, the supreme law of the land, which treaty guaranteed to the Japanese residents everywhere in the Union full and perfect protection for their persons and property, and to this end everything in my power would be done, and all the forces of the United States, both civil and military, which I could lawfully employ, would be employed." Mayor Schmitz and a number of prominent men of the city hurried across the continent to confer with the President. A troublesome point of constitutional law was involved. It was admitted that public education is distinctly a State function. A treaty is declared by the Federal Constitution¹⁰ to be the "supreme law of the land." Is a treaty the "supreme law of the land" in the sense that the President or Supreme Court can treat as invalid a State statute which contravenes it, or must the Federal government bow in submission to that State statute even though it is counter to a treaty obligation? The treaty of 1894 with Japan accorded to the Japanese residents in the United States the rights and privileges of the "most favored nation." The State of California had declared that Mongolian children, among which were Japanese, might, at the discretion of the Board of Education, be required to go to separate schools for their race. The children of the other "most favored" nations were permitted to attend the regular public schools. Is admission to the regular public schools one of the rights and privileges guaranteed to Japanese children by the treaty, which cannot be limited by a

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State, or does the State of California, by its police power, have a right to separate the school children by race, regardless of national treaties? These questions, however, did not have to be answered; before the crisis came, all parties seemed to have arrived at a satisfactory compromise. It was an agreement that all Japanese children not over fourteen years of age should be readmitted to the primary schools, and those over that age should be admitted to the schools of higher grade, and the Japanese coolie labor should be excluded. Thus was obviated what at one time looked like the approach of an international controversy over the separation of the races in schools.

During the last session of the California legislature, that of 1909, several bills concerning the Japanese were introduced, one of which was as follows: "Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the Board of School Trustees or city Board of Education have power to admit adults and children not residing in the district whenever good reasons exist therefor.

"Trustees shall have the power to remove children of filthy or vicious habits or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Japanese or Chinese descent.

"When such separate schools are established, Indian, Chinese, Japanese or Mongolian children must not be admitted into any other school; provided, that in cities and towns in which the kindergarten has been adopted, or may hereafter be adopted as part of the public primary schools,

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children may be admitted to such kindergarten classes at the age of four years; and provided further, that in cities or school districts in which separate classes have been or may hereafter be established for the instruction of the deaf, children may be admitted to such classes at the age of three years." Practically the only difference between this bill and the present law is the insertion of "Japanese."

President Roosevelt considered this and the other bills of such serious import that he telegraphed to the Governor of the State to use his influence to prevent enactments of this nature. After a long fight the bill was killed. The legislature made an appropriation for a census of the Japanese in California in order to see just how serious the problem was.¹²

The people along the Canadian Pacific coast are facing a question similar to that in California. A member of the provincial Parliament from Manaimo, British Columbia, has recently given notice that he will introduce a measure providing for the exclusion of Oriental children from public schools, declaring that his purpose is to compel the government to maintain separate schools.¹³

DR. CHARLES W. ELIOT ON SEPARATION OF RACES IN SCHOOLS

The third incident referred to, though not a matter of legislation, did much to focus the attention of the country at large upon the question of the separation of the races in schools. The Twentieth Century Club of Boston met at luncheon on the 14th of February, 1907, to consider the situation of Berea College. Dr. Charles W. Eliot, then

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President of Harvard University, was one of the speakers. In the course of his remarks, he said: "If the numbers of whites and blacks were more nearly equal [in Boston] we might feel like segregating the one from the other in our own schools. It may be that as large and generous a work can be done for the Negro in this way as in mixed schools. So the separation of the races in the Berea schools is not really an abandonment of the principle, although it may be a departure from the original purpose.

"Perhaps if there were as many Negroes here as there we might think it better for them to be in separate schools. At present Harvard has about five thousand white students and about thirty of the colored race. The latter are hidden in the great mass and are not noticeable. If they were equal in numbers or in a majority, we might deem a separation necessary." ¹⁴

These conservative and guarded words of the head of the University which has, above all other American institutions of learning, preserved and encouraged the "open-door policy" toward students of all races, struck consternation to the radicals of both the white and colored races in the North and East, and gladdened the hearts of many of the South and West who are facing their own race problems. One side felt that it had lost an illustrious standard-bearer; the other, that it had won a strong ally.

These three incidents show that the separation of the races in schools is a live question, worthy of an investigation. It is probable that there are many private and public schools outside of the South which do not, in fact, admit colored students. Probably there are schools which would close their doors to white applicants. It may be that there

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are actual discriminations against one or the other race in those schools which claim to make no distinction on account of race or color. But many such matters as these have not come under the eye of the law, and so have no place here.

SEPARATION BEFORE 1865

Although one need not consider in detail the laws separating the races in schools before the Civil War, because the public school system then was poorly developed, as a rule, and the Negro had not attained the rights of a citizen in many States, still it is well to look into some of the antebellum statutes and decisions to find precedents for later statutes and rulings of the courts upon this subject.

In Ohio, prior to 1848, no provision was made for the public education of colored children, and the property of colored persons was not taxed for school purposes. In fact, a law ¹⁵ of February 10, 1829, expressly excluded black and mulattoes from the public schools. In 1834, the child of a man three-quarters white and of a white woman was denied admission to a public school. In a case ¹⁶ arising out of it, the court held that a child with more than one-half white blood is entitled to the privilege of the whites, saying: "We think the term white as used in the law describes *blood* and not *complexion*. . . . The plaintiff's children, therefore, are white within the meaning of the law, though the defendants have had the shabby meanness to ask from him his contribution of tax, and exclude his children from the benefit of the school he helped to support."

In 1848, a law ¹⁷ of the same State provided for the

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levy of a tax upon the property of colored persons for the support of colored schools, if the objection was made to the admission of colored children into white schools. It prohibited the application of any part of the tax paid by white persons to the support of colored schools unless the whites assented thereto. A law having so many options was objectionable and was repealed within a year. The next year, 1849, a statute¹⁸ was enacted with regard to the education of colored children, but this appropriated to the colored schools only the funds arising from taxes paid by colored persons. The year before the white patron of a school had brought an action against the directors because they erroneously admitted colored children to the school, thus contriving, he said, "to deprive him of the benefit" of sending his children to the school. The court¹⁹ ruled that the directors were not liable because they did not act with corrupt motives, but had simply misjudged the law.

The law of 1849 gave rise to a difficulty. The Constitution of Ohio, by restricting the electorate to white persons, had provided that those entrusted with any power connected with the government of the State should be white persons. Are school directors entrusted with any governmental power? The court²⁰ held that they are not, in the sense of the Constitution, and that colored persons might be directors of colored schools. A statute²¹ of 1853 repealed that of 1849 and provided for a division of the public school funds in proportion to the number of children of school age, regardless of color. But separate schools were still maintained. Under this law, it was held²² that the children of three-eighths African and five-eighths white blood, who were distinctly colored and generally treated

and regarded as colored children by the community wherein they resided, should not be, as of right, entitled to admission into white schools.²³ In 1841, it had been held that a youth of Negro, Indian, and white blood, but of more than half white blood, was entitled to the benefit of the school fund.

In Indiana,²⁴ in 1850, the public school law provided for a tax levy for the support of the schools, but omitted "all Negroes and mulattoes" from the tax list. Some colored children applied for admission, not as beneficiaries of the public school fund, but offering to pay their own tuition. The court²⁵ of that State held that they could not be received if the resident parents of white children attending or desiring to attend the school objected, saying: "This [the exclusion of the colored children] has not been done because they do not need education, nor because their wealth was such as to render aid undesirable, but because black children were deemed unfit associates of white, as school companions. Now, surely, this reason operates with equal force against such children attending the schools at their own, as at the public expense."

In the case of *Roberts v. The City of Boston*,²⁶ which was argued before the Supreme Court of Massachusetts in 1849, in which Charles Sumner was counsel for the plaintiff, the court gives the following interesting information: "The colored population of Boston constitute less than one sixty-second part of the entire population of the city. For half a century, separate schools have been kept in Boston for colored children, and the primary school for colored children in Belknap street was established in 1820, and has been kept there ever since. The teachers of this

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school have the same compensation and qualifications as in other like schools in the city. Schools for colored children were originally established at the request of colored citizens, whose children could not attend the public schools, on account of the prejudice then existing against them. . . .

“ In 1846, George Putnam and other colored citizens of Boston petitioned the primary school committee that exclusive schools for colored children might be abolished, and the committee, on the 22d of June, 1846, adopted the report of a sub-committee, and a resolution appended thereto, which was in the following words:

“ ‘ Resolved, that in the opinion of this board, the continuance of the separate schools for colored children, and the regular attendance of all such children upon the school, is not only legal and just, but is best adapted to promote the education of that class of our population.’ ”

At the time of this case, there were one hundred and sixty primary schools in Boston, of which two were set apart for colored children. The facts of the case were these: A colored child applied for admission to a white school on the ground that the colored primary school was one-fifth of a mile farther from her home. The general school committee refused her admission, and the colored girl, through her father, sued the city of Boston. The Supreme Court upheld the power of the committee to provide separate schools for colored children and prohibit their attendance at other schools. The court also said: “ It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably

cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment." This line of argument is familiar to those who have studied the decisions of Southern courts upon the separation of the races in schools, in public conveyances, hotels, theatres, and other public places.

The attitude of the courts and legislatures of Indiana, Ohio, and Massachusetts, not one of which is a Southern State, toward the association of white and colored school children shows that there was ample precedent for the laws of the postbellum period. It is probable that a careful examination of the annual statutes of the other States before 1865 would reveal that separation was required in them also; that is, where any provision at all was made for the public instruction of Negroes. For instance, the law in Delaware ²⁷ in 1852 was that the public school should be free to all white children of the district over five years old. The inference to be drawn is that colored children were excluded.

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PRESENT EXTENT OF SEPARATION IN PUBLIC SCHOOLS

(a) In South

It is a matter of general knowledge that white and colored children are not permitted to attend the same public schools in the South. The separation is required both by State Constitutions and statutes.

The Constitutions of Alabama of 1875²⁸ and 1901²⁹ provide for a system of public schools, but add that separate schools must be maintained for white and colored children. The laws³⁰ of 1868 have this provision: "In no case shall it be lawful to unite in one school both colored and white children, unless it be by the unanimous consent of the parents and guardians of such children; but said trustees shall in all other cases provide separate schools for both white and colored children." The separation is also required in the laws of 1878³¹ and 1884.³²

Arkansas has no constitutional provision as to separation, but an act³³ of 1867 reads: "No Negro or mulatto shall be permitted to attend any public school in this State, except such schools as may be established exclusively for colored persons." And a statute of 1873³⁴ declares that the board of education must provide separate schools.

The Constitution³⁵ of Florida of 1887 provides that white and colored children shall not be taught in the same school, but that impartial provision shall be made for both. A statute³⁶ of 1895, which will be considered later, makes it a penal offence to educate white and Negro children in the same schools, whether public or private or parochial.

Under a Georgia statute³⁷ of 1866, any free white citizen between the ages of six and twenty-one years and any

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disabled and indigent soldier of the State under the age of thirty might have instruction in the schools free of charge. This would seem to leave out the colored children. But the Constitution³⁸ of 1877 requires separate schools; so do the laws of 1872.³⁹

The laws of Kentucky⁴⁰ of 1870 provided that it should be the duty of the trustees of the common schools of that State to invite and encourage indigent white children in the district to attend the school, and to inform them and their parents that such was their right for which the State paid, though they themselves might contribute toward paying the expenses of the school. The annual report of the trustees must always show that this duty had been performed; and no arrangement should be made for the benefit of some individuals of this description to the exclusion of others. Again, apparently no provision was made for the colored children, but the Constitution⁴¹ of 1891 declares that in the distribution of the school fund no distinction shall be made on account of race or color, but that separate schools must be maintained. The statute⁴² of 1904, under which the Berea College case arose, applies to both public and private schools and requires a separation of the races in both.

The government of Louisiana was early in the hands of the Reconstructionists, as its statutes show. The Constitution⁴³ of 1868 said: "There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana." A separation of the races in schools had been required by the Constitutions of 1845⁴⁴ and 1852,⁴⁵ which makes this provision of the Constitution of 1868 all the more significant. In 1871

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provision was made for an institution for the instruction of the blind, and an industrial home for the blind at Baton Rouge. The statute⁴⁶ relative to these concluded thus: ". . . no part of this act shall be construed so as to deprive any person on account of race or color of the privilege of admittance to the institution." A law⁴⁷ of 1875 which established an agricultural and mechanical college provided that there should be no discrimination of race or color in the admission, management, or discipline of the institution. The Constitution of 1879 did not expressly prohibit the separation of the races in schools, as that of 1868 had done, but on the other hand it did not require separation. It seems, rather, to have left the matter in the hands of the legislature. The first reference made to separate schools was in 1880, when a university was established for the education of persons of color, called the Southern University, four of the twelve trustees of which were to be Negroes.⁴⁸ Finally, the Constitution⁴⁹ of 1898 requires the general assembly to establish free public schools for the white and colored races.

A Maryland statute⁵⁰ of 1870 declared that all the taxes paid for school purposes by the colored people in any county or in the city of Baltimore, together with donations for that purpose, should be set aside for maintaining schools for colored children. The school commissioners were given power to make further appropriations as they should deem proper to assist the colored schools. A law⁵¹ of 1872 provided that the school commissioners should establish one or more public schools in each election district for colored children, which must be kept open as long as the other public schools of the county were kept open.

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They are subject to the same laws and must furnish instruction in the same branches as the white schools. The taxes paid for school purposes by colored persons must be devoted to the maintenance of colored schools. This is the Maryland law,⁵² in substance, as it exists at present, except that a separate school does not have to be provided in each election district unless the colored population in that district warrants the board in establishing a colored school. Where there are not enough Negroes in a district to have a school of their own, presumably, they go to the colored schools in neighboring districts.

As early as 1878 a statute of Mississippi⁵³ provided that schools should be arranged in each county so as to afford ample free school facilities for all educable youths in the county, prohibiting the teaching of white and colored pupils in the same school-house, and the Constitution⁵⁴ of 1890 reiterated this requirement of separation. The county school boards are given power to locate one or more schools for Indians in counties where there are enough Indians to form a school.⁵⁵

Missouri seems not to have lost an opportunity to express its belief in separate schools for the races. The Constitution⁵⁶ of 1865 made that requirement, adding that the school fund must be appropriated in proportion to the number of children without regard to color. Such separation is required by the laws of 1865,⁵⁷ of 1868,⁵⁸ of 1869,⁵⁹ by the Constitution of 1875,⁶⁰ and by a law of 1889,⁶¹ which last made it unlawful for colored children to attend a white school, or white children, a colored school.

The Constitution of North Carolina⁶² of 1875 declares that "the children of the white and the children of the

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colored shall be taught in separate public schools, but there shall be no discrimination made in favor of, or to the prejudice of either race." According to the statute ⁶³ of 1901, a child descended from a Negro to the third generation inclusive should not attend a white school. This was amended ⁶⁴ in 1903 to the effect that no child with Negro blood in his veins, "however remote the strain," shall attend a school for the white race. The present statute ⁶⁵ also provides that the descendants of Croatan Indians now living in Robeson and Richmond counties shall have separate schools for their children. It will be remembered that it is the Croatan Indians who are prohibited from intermarrying with Negroes.

The Territory of Oklahoma ⁶⁶ had the following peculiar arrangement for separate schools till 1901: In each county an election was held every three years at which all the qualified school electors could vote for or against the maintenance of separate schools in that county. If a majority voted against separation, then the white and colored children might attend the same school; but if a majority voted for separation separate schools had to be provided. In counties which separate schools were voted in the schools for whites and blacks had to be equal in length of terms and in facilities. Any failure to comply with the law rendered the act for establishing separate schools void, and immediately the schools were opened to both races. In 1901 ⁶⁷ separate schools were required all over the Territory. In case the children of one race in a district did not exceed ten, they were to be transferred to a school for their race in another district instead of a separate school being maintained for them, provided the distance was not

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over two miles and a half. The white and colored schools were to be furnished with the same kind of furniture and equipment. No white teacher should teach in a colored school and *vice versa*. The Constitution⁶⁸ of the State of Oklahoma, adopted September 17, 1907, provides: "Separate schools for white and colored children, with like accommodation, shall be provided by the legislature and impartially maintained. The term 'colored children,' as used in this section, shall be construed to mean children of African descent. The term 'white children' shall include all other children." An Oklahoma statute⁶⁹ of 1907 requires complete separation of the races in schools, with impartial facilities for both races. By "colored children," it means those that have any "quantum of Negro blood." The teacher who knowingly and willingly permits a child of one race to be taught in a school for another race is guilty of a misdemeanor, and may be punished by a fine of between ten and a hundred dollars and, in addition, may have his certificate cancelled and be unable to secure another for a year. The separation applies to private schools and colleges as well as public schools.

The South Carolina government was, like that of Louisiana, early under Reconstruction. The Constitution⁷⁰ of 1868 provided that "all the public schools, colleges and universities of this State, supported in whole or in part by the public school fund, should be free and open to all the children and youths of that State, without regard to race or color. In fact, the University of South Carolina was open to Negroes directly after the War.⁷¹ But the Constitution⁷² of 1895 requires separate schools, and adds that "no child of either race shall ever be permitted

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to attend a school provided for children of the other race.” The Negro public schools of the city of Charleston are taught by white people, mostly Southern-born white people.

Tennessee, by its laws ⁷³ of 1866, by its Constitution ⁷⁴ of 1870, and by its laws ⁷⁵ of 1873 requires separate public schools for the white and colored children. A statute ⁷⁶ of 1901 prohibits the co-education of the white and colored races in private schools.

The Texas Constitution ⁷⁷ of 1876 provided for separate schools and impartial accommodations for both races. A school-house constructed in part by voluntary subscription by colored parents and guardians and for a colored school community shall not be used without their consent for the education of white children, and *vice versa*.⁷⁸ The separate school requirement was repeated in the laws of 1884,⁷⁹ 1893,⁸⁰ and 1895.⁸¹ The Texas provision is that a school which receives both white and colored pupils shall not receive any of the public school fund, which amounts to saying that it is not unlawful to educate white and colored children together in private schools.

The Constitution of Virginia of 1870 did not declare that the races must be separated in schools. But statutes of 1882 ⁸² and 1896 ⁸³ provide that white and colored persons shall not be taught in the same school but in separate schools, under the same general regulations as to management, usefulness, and efficiency. The Virginia Constitution ⁸⁴ of 1902 has the terse statement that white and colored children shall not be taught in the same school.

(b) In States Outside of South

Besides the Southern States, which have just been considered, there are other States which require or permit a separation of the races in schools. The separation of the white and Japanese children in the public schools of San Francisco has already been discussed. That was only a part of the legislation of California. A statute ⁸⁵ enacted during the session of 1869-70 read: "The education of children of African descent and Indian children shall be provided for in separate schools. Upon the written application of the parents or guardians of at least ten such children to the board of trustees or board of education, a separate school shall be established for the education of such children; and the education of a less number may be provided for by the trustees in separate schools in any other manner." In 1874 a Negro child was refused admission to a white school in that State. In a test case which arose the constitutionality of the statute was supported, the court ⁸⁶ being of opinion that the statute did not violate the Fourteenth Amendment if appropriate schools for colored children were maintained. But, it added, unless such separate schools are actually maintained, colored children must be admitted to the regular public schools along with the white children. This latter ruling became part of a statute of 1880. Prior to 1880 the law had been that "every school, unless otherwise provided by law, must be open for the admission of all white children. . . ." This was amended in 1880 ⁸⁷ by the omission of the word "white" and by repealing the sections providing for Negro and Indian schools. On the strength of this amendment,

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a Negro, upon being refused admission to the white schools, brought suit,⁸⁸ and it was held that, as the law stood, colored children had equal rights with white children to admission to any public school, even though separate schools were maintained. The court said: "The whole policy of the legislative department of the government upon this matter is easily gathered from the course of legislation shown therein; and there can be no doubt but that it was never intended that, as a matter of classification of pupils, the right to establish separate schools for children of African descent, and thereby to exclude them from white schools . . . should be given to such boards [of education]." It was earlier, in 1872, that the provision for separate schools for Mongolians was made. The law of California seems now to be that Negro children may attend the same schools as whites, but Japanese, Chinese, and Korean children must go to separate schools if the board of education sees fit to provide them.

The legislature of Delaware,⁸⁹ in 1881, appropriated two thousand four hundred dollars annually for the education of colored children. In 1889 three colored schools⁹⁰ were incorporated and placed in control of boards of trustees elected by the voters of the district. These incorporated schools⁹¹ as such were abolished in 1893, and after that they were placed under the supervision of the regular county superintendent just as the other public schools. The same State,⁹² in 1898, provided for the establishment of separate kindergartens. Thus, Delaware is as strict as the Southern States in requiring separate schools for the races.

Although the Illinois statutes⁹³ clearly state that any

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school officer who excludes from a public school any child on account of color shall be fined from five dollars to one hundred dollars for each offence, and prohibits school directors and officers from excluding, directly or indirectly, children on account of color, still the numerous cases which have arisen involving the point show that the school officers have not always been in thorough agreement with the law.

In 1874 the school directors of McLean County, Illinois, erected a separate school building, twelve by fourteen feet, for the exclusive purpose of educating the three or four colored children in the district therein. It was admitted that there was plenty of room for them in the regular school building. One of the taxpayers of the district petitioned for an injunction against the building of the house, but it was completed before any decision was rendered. In a case which arose later, the court ⁹⁴ held that the school directors had no right to make such a discrimination against Negroes, and that any taxpayer might object. In 1882 the board of education of Quincy, Illinois, divided the city into eight districts and set apart one school for Negroes. A case arising over this division and segregation, the court ⁹⁵ ruled that, in the absence of State legislation, the board had no power to establish separate schools for Negroes. In 1886 the school board of Upper Alton passed a resolution excluding colored children from the white school unless they had reached the high school grade. A Negro, whose children below high school grade were refused admission to the white school, brought suit, and the court ⁹⁶ held that the school board had no power to separate the children on account of color. In 1899 the com-

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mon council of Alton established a school for Negroes, but the court ⁹⁷ held that this involved an illegal discrimination against them. The Associated Press report ⁹⁸ of November 28, 1906, had the following statement: "East St. Louis, Ill., Nov. 28, 1906—A large brick building at 1,400 Missouri avenue, which was leased last week by the Board of Education for a Negro school, was destroyed by fire to-day, and there is evidence that prejudice against the establishment of a school for Negroes caused the building to be set on fire. Late last night the building was discovered to be on fire, but prompt action saved it. The firemen found rags soaked in oil on the second floor hallway. The destruction of the building to-day makes the second building leased for a Negro school that has been burned within the last two weeks." The latest Illinois case on the subject is that of April 23, 1908, *The People v. The Mayor, etc., of Alton*.⁹⁹ A Negro's children were excluded from the public school most convenient to them and directed to a colored school less convenient. He petitioned for a writ of *mandamus* against the mayor and common council to compel them to admit his children to the most convenient school, and after the case had been tried seven times by juries in the circuit court, the writ was finally granted by the Supreme Court. Although all of these cases were decided against race separation they show that there is still an appreciable feeling in Illinois against the white and colored children being taught in the same schools. The trouble at Alton is not yet over. After a fourteen years' fight the Negroes won, as has been seen, before the Supreme Court of the State. But when the Negro children applied for admission to the public schools, they

were again refused. Before the schools were opened for the session of 1908-09, many of the Negroes were visited and induced to send their children to the four Negro schools built in Alton. But forty other Negroes filed a petition for a writ of *mandamus* against the mayor and council of Alton seeking to have them answer why they refused to obey the mandate of the Supreme Court of the State.¹⁰⁰

A statute ¹⁰¹ of Indiana of 1869 required the trustees of schools to organize separate but equal schools for Negroes. If there were not enough Negroes in the district for a school, two or more districts might be consolidated for that purpose. If there were not enough within a reasonable distance, then the trustees might provide such other means of education of colored children as would employ their proportion of the school fund to the best advantage. A case ¹⁰² testing the constitutionality of this law, which arose in 1874, is one of the most exhaustive cases on the subject. The father of Negro children applied for a mandate to compel the admission of them to white schools. The court held that the separation of the races in schools is not in violation of the Federal or the State Constitution. The common schools, it was said, are based upon State legislation, are domestic institutions, and, as such, subject to the exclusive control of the constituted authorities of the State. The Federal Constitution does not provide for any general system of education to be conducted and controlled by the national government, nor does it vest in Congress any power to exercise a general or special supervision over the State on the subject of education. Under the Constitution of Indiana the common

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school system must be general, uniform, and equally open to all, but uniformity will be secured where all schools of the same grade have the same system of government and discipline, the same branches of learning taught, and the same qualifications for admission. The court said: "In our opinion the classification of scholars on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class . . . there would be as much lawful reason for complaint by one scholar in the same school that he could not occupy the seat of another scholar therein at the same time the latter occupied it, or by scholars in different classes in the same school, that they were not placed in the same class, or by scholars in different schools, that they were not all placed in the same school, as there is that black and white children are placed in distinct classes and taught in separate schools."

In 1877, the Indiana law of 1869 was amended ¹⁰³ so that the school directors *might* (not *must*) organize separate schools for the races. In case a colored school was not provided, the colored children should be allowed to attend the regular white school. When the colored child had reached a grade higher than that taught in the colored school, he must be admitted to the regular high school, and no distinction therein should be made on account of race or color. In 1882, there were only about six Negro children in a certain district, and the trustees were indicted for not establishing a separate school for them. The court ¹⁰⁴ ruled that it was impracticable to maintain a separate school for so small a number. In 1883, a Negro

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pupil brought suit on the ground that he was not admitted to the white high school, under the law of 1877, but he did not show that he had passed the required examination. The court ¹⁰⁵ held that the discretion as to the competency of the child is a matter for the board of education, not the court.

The laws of Iowa have not since 1865 required or permitted a separation of the races in schools. In 1868, a Negro girl, denied admission to the graded schools of Muscatine, brought suit, and the court ¹⁰⁶ gave relief, saying that the school directors could not require Negroes to attend separate schools; that if separate schools for Negroes are prescribed, the same might as well be done for German, Irish, and French children. The same principle has been affirmed in subsequent decisions which show that there have been instances in that State of school boards trying to separate the races.¹⁰⁷

By the statutes ¹⁰⁸ of Kansas of 1868 the boards of education of cities of the first class—that is, cities of over 150,000 inhabitants—had the “power to organize and maintain separate schools for the education of white and colored children.” This power was omitted in a revision of the school law ¹⁰⁹ in 1876, and consequently repealed by implication. But in 1879 a statute ¹¹⁰ was passed amending the school law, which revived the power to separate the races in cities of the first class “except in the high school, where no discrimination shall be made on account of color.” The constitutionality of this statute was upheld by the Supreme Court ¹¹¹ of Kansas in 1903, and again in 1909. The State has not given this power of separation to cities of the second class, so the courts ¹¹² have held that,

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except in cities of the first class, the colored children must be admitted to the schools along with the white children. The Superintendent of Public Schools of Kansas,¹¹³ in August, 1906, said: "There is a movement in Kansas looking toward the segregation of the races in the public schools, where the per cent. of colored population will warrant the separation.

A law¹¹⁴ of Nevada of 1865 excluded Negroes, Mongolians, and Indians from the public schools, and prescribed as a punishment to the school opening its doors to all races a withdrawal of its share of the public school fund. The school officials might, however, if they deemed it advisable, establish a separate school for the children of Negroes, Mongolians, and Indians, to be supported out of the public school fund. In 1872 it was held¹¹⁵ that a *mandamus* would lie compelling trustees to admit colored persons to the public schools where separate schools were not provided for such persons. No subsequent reference to the subject appears in the statutes or reports, so it may be assumed that separate schools no longer exist in Nevada.

A statute¹¹⁶ of New Jersey of 1881 made it unlawful to exclude anyone from the public school on account of "religion, nationality, or color." The town of Burlington had four public schools, one of which had been set apart for Negroes. A Negro petitioned for a writ of *mandamus* to compel the trustees to admit his children to the white schools, and the court¹¹⁷ issued the writ. About four years ago the public schools of East Orange, New Jersey, adopted the policy of teaching the Negro pupils in separate classes; but it was soon abandoned because, the school

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authorities said, "it seemed like going back to old ideas." ¹¹⁸

The city of Buffalo, New York, under a provision of its charter, established separate schools for Negroes, and this action was upheld by the court ¹¹⁹ on the ground that the right to attend common schools is a legislative grant and not a constitutional guarantee. The city of Albany also set apart one school for Negroes, and this was held ¹²⁰ constitutional in 1872. And in 1883, the Supreme Court ¹²¹ of that State held that, if separate schools are provided for colored children, they may be excluded from the white schools. In 1899, the same was held ¹²² for the Borough of Queens. These decisions were under the law of 1864, ¹²³ reënacted in 1894, ¹²⁴ which gave power to the school authorities of cities and incorporated villages, when they deemed it expedient, to establish separate schools. But this law was repealed in 1900, ¹²⁵ and the present law reads: "No person shall be refused admission to or be excluded from any public school in the State of New York on account of race or color."

An Ohio statute ¹²⁶ of 1878 gave the boards of education discretionary power to establish separate schools for Negroes. This law was repealed in 1887, ¹²⁷ and thereafter all public schools were open to colored children. ¹²⁸

In 1869, persons of color were not admitted to the sub-district schools of Pittsburg, Pennsylvania, ¹²⁹ but this law was repealed in 1872. ¹³⁰ An earlier statute of 1854 had provided for separate schools for Negroes where there were more than twenty in the district. The school directors of Wilkesbarre had united two districts, each having less than twenty colored children, and put up a school building

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for Negroes; but the court ¹³¹ held that this was in violation of the law of 1854. This law was repealed in 1881,¹³² and it was thereafter unlawful to make any distinction whatever on account of race or color. The next year, it was held ¹³³ that the school directors could not keep open schools for Negroes exclusively.

A West Virginia law ¹³⁴ of 1865 required the boards of education to establish separate schools for Negroes where there were more than thirty children of that race in the district. But if the average daily attendance was less than fifteen for a month, the school should be discontinued for any period not exceeding six months. If there were less than thirty children in the district or the attendance was less than fifteen, the money should be reserved and used for colored education as the board thought best. A statute ¹³⁵ of 1871 and the Constitution ¹³⁶ of 1872 provided that white and colored persons should not be taught together. A separate school for Negroes must be established when the number in the district exceeds twenty-five. If less, the trustees of two or more districts may establish a joint school. The Supreme Court ¹³⁷ of that State has held that the constitutional provision requiring separate schools does not violate the Fourteenth Amendment, but that the terms of the schools of both races must be of the same length. Thus, West Virginia is as strict as Virginia or any Southern State in separating the races in schools.

Wyoming has the following statute ¹³⁸: "When there are fifteen or more colored children within any school district, the board of directors thereof, with the approval of the county superintendent of schools, may provide

a separate school for the instruction of such colored children.”

The statutes ¹³⁹ of Arizona, until 1909, declared that no child should be refused admission to any public school on account of race or color. Last year, however, the school law of that Territory was amended ¹⁴⁰ so as to give the board of trustees of school districts power, when they deem it advisable, to segregate pupils of the African from pupils of the white race and to provide all accommodations made necessary by such segregation, but the power to segregate shall be exercised only where the number of pupils of the African race shall exceed eight in any school district. This amendment was passed over the Governor's veto by a two-thirds' vote of the legislature.

The Constitutions of Colorado ¹⁴¹ of 1876 and of Idaho ¹⁴² of 1889 provide that no distinction or classification of pupils shall be made on account of race or color, and the judicial decisions of those States do not show any attempts by the school boards to draw color lines.

Separate schools were abolished by law in Massachusetts in 1857.¹⁴³ The present statute ¹⁴⁴ declares that no child shall be excluded from a public school of any city or town on account of race or color. In practice, the matter is not entirely at rest in Massachusetts.

The law ¹⁴⁵ of Michigan prohibits the segregation of the races in schools. Because of objections made by white students, two Negroes,¹⁴⁶ in 1908, were refused admission to the Grand Rapids, Michigan, Medical College, a private institution. The Negroes appealed to the State circuit court, which issued a writ of *mandamus* compelling the school to admit them. When this was granted and they

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were accordingly admitted, thirty-four members of the junior class of the school "struck," and the authorities suspended the class for a time. The Supreme Court ¹⁴⁷ of Michigan later reversed the order granting the writ of *mandamus*, saying that a private institution of learning, though incorporated, has a right to say whom it will receive.

A statute ¹⁴⁸ of Minnesota declares that a district shall not classify its pupils with reference to race or color, nor separate them into different schools or departments upon such grounds. The punishment for violation of this law by a district is a forfeiture of its share of the public school fund so long as the classification or separation continues. The Territory of New Mexico ¹⁴⁹ makes it a misdemeanor for a teacher or school director to exclude any child on account of race or nationality, under penalty of a fine from fifty dollars to one hundred dollars and three months imprisonment, and being forever barred from teaching school or holding any office of profit or honor in the Territory.

The separation of the races in public schools is required by the Constitutions of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Complete separation is required by statute in all of the above-named States and, besides those, also in Arkansas, Maryland, and Delaware. A discretionary power is given to the school boards to establish separate schools in Arizona; in Indiana; in California, as to schools for Indians, Chinese, and Mongolians; in Kansas, in cities of over 150,000 inhabitants; and in Wyoming, in districts having fifteen or more colored pupils. The following

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States that once had separate schools now prohibit them: Illinois, Massachusetts, Nevada, New Jersey, New York, Ohio, and Pennsylvania. In addition to these, separate schools are not allowed in Colorado, Idaho, Iowa, Michigan, Minnesota, New Mexico, and Rhode Island. There are other States which have never seen fit to make any mention one way or the other of race distinctions in schools, either in statutes or court reports; so one is warranted in inferring that the schools are open to all. They are Connecticut, Maine, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Utah, Vermont, Wisconsin, and Washington.

As has already been said, public education is distinctly a State function. The Federal government, in the main, has not undertaken to have anything to do with it, but Congress, by its exclusive jurisdiction, has supreme control over the public schools of the District of Columbia, and the provisions that it has made there for the separation of the races show in an interesting way the attitude of the national government upon the subject. A statute¹⁵⁰ of 1864 reads: "That any white resident of said county shall be privileged to place his or her child or ward at any one of the schools provided for the education of white children in said county he or she may think proper to select, with the consent of the trustees of both districts; and any colored resident shall have the same rights with respect to colored schools.

"That it shall be the duty of said commissioners to provide suitable and convenient houses or rooms for holding schools for colored children. . . ." The commissioner might impose a tax of fifty cents *per capita* upon

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the patrons of the school to aid in its support, but no child should be excluded because its parents or guardians could not pay the tax. The school fund was to be divided in proportion to the number of school children, regardless of race.

In 1890 an increase of the Federal appropriation¹⁵¹ to schools was accompanied with the following proviso: "That no money shall be paid out under this act to any State or Territory for the support or maintenance of a college where a distinction of race or color is made on the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of the act, if the funds received in such State or territory be equitably divided as hereinafter set forth."

SEPARATION IN PRIVATE SCHOOLS

Thus far, except in the matter of Berea College, the separation of the races in private schools only has been considered. Legislation as to private schools is comparatively meagre. A statute¹⁵² of Florida of 1895 makes it a penal offence to conduct a school of any grade—public, private, or parochial—wherein white persons and Negroes are instructed or boarded within the same building, or taught in the same class, or at the same time by the same teacher. The punishment for violating the law by patronizing or teaching in such a school is a fine of from one hundred and fifty to five hundred dollars, or imprisonment from three to six months. A statute¹⁵³ of Tennessee of 1901 makes it lawful for any school, acad-

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emy, or other place of learning to receive both white and colored pupils at the same time. It is unlawful for any teacher to allow them to attend the same school or to teach them together or to allow them to be taught together, under a penalty of fifty dollars for each offence and imprisonment from thirty days to six months. The most recent statute on the subject of private schools is that of Oklahoma in 1908. It is plainly modeled after the Kentucky law of 1904. Under the Oklahoma statute,¹⁵⁴ it is unlawful for a person, corporation, or association of persons to maintain or operate any college, school, or institution where persons of the white and colored races are both received as pupils for instruction. The person, corporation, or association that operates a school in violation of the statute is guilty of a misdemeanor, and may be fined not less than one hundred nor more than five hundred dollars. Each day such a school is kept open is a separate offence. One who teaches in such a school is guilty of a misdemeanor and may be fined from ten to fifty dollars for each day. One who goes to such a school as a pupil may be fined from five to twenty dollars for each day. It is not unlawful, however, for a private school to maintain a separate and distinct branch thereof "in a different locality." The Kentucky statute, it will be remembered, required the separate branch to be, at least, twenty-five miles from the main school. The Oklahoma legislature declared that it was necessary "for the immediate preservation of the public peace, health, and safety" that this act take effect at once.

Florida, Kentucky, Oklahoma, and Tennessee are the only States that expressly prohibit the teaching of white

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and colored persons in the same private school. Other States—as Georgia and Texas—declare that, if a school admits both races, it shall have none of the public school fund, saying, by implication, that one may operate a school for both races if he will give up his claim to State aid. On the other hand, Minnesota has enacted a statute to the effect that, if a school refuses to admit pupils of both races, it shall have none of the public school fund, thus saying, by implication, that it is not unlawful to conduct a private school exclusively for one race. The recent decision of the Supreme Court of Michigan to the effect that a private school may exclude Negroes even though the law of the State requires public schools to be open to all, regardless of race or color, has been considered.

EQUALITY OF ACCOMMODATIONS

In general, the “accommodations, advantages, and facilities” of schools for Negroes are to be equal to those for white children, but the requirement has, in many cases, been loosely construed. It has been held in Missouri¹⁵⁵ and Ohio,¹⁵⁶ for instance, that it is not an unjust discrimination for the colored children to have to walk farther to school than the white children. The Supreme Court¹⁵⁷ of Kansas in 1903 decided that uniformity of schools for white and colored children did not require equality of buildings. The court said: “True, for the accommodation of a numerous white population a much larger and more imposing school building is provided than that set apart for the few colored children in the district. This, however, is but an incidental matter, and necessarily

unavoidable in the administration of any extended school system. School-houses cannot be identical in every respect; but parents cannot, on this account, dictate the one their children shall attend."

The County Board of Education of Richmond County, Georgia, in 1880, established a high school for Negroes, but in 1897 it was discontinued for economic reasons, because the money to educate fifty or sixty Negroes in the high school would give the rudiments of education to two hundred of the four hundred young Negroes in the county who were crowded out. It was understood that the school would be re-opened as soon as economic considerations permitted. A Negro brought suit against the board for discrimination against his race in that the white high school to which the Board made contributions had not been closed also. The Supreme Court of that State held ¹⁵⁸ that the Board had the right to establish or discontinue high schools when the interests and convenience of the people require it. There were more white children of the high-school grade than colored; therefore, the court argued, the Board was justified in continuing the white high school. The case was appealed to the Supreme Court ¹⁵⁹ of the United States, which affirmed the decision of the State court. Mr. Justice Harlan, delivering the opinion of the court, said: ". . . while all admit that the benefits and burdens of public taxation must be shared by the citizens without discrimination against any class on account of their race, the education of the people in the schools maintained by State taxation is a matter belonging to the respective States, and any interference on the part of the Federal authority with the management of such schools cannot be

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justified except in the case of clear and unmistakable disregard of rights secured by the supreme law of the land."

In general, where separate schools are required, it is said that they must be equal for both races; but it has been held that it is not an unjust discrimination to build more imposing school-houses for the many white children than for the few colored children; to require the children of one race to walk farther to school than the other, or to maintain high schools for one race without doing so for the other. Only a very few States have escaped altogether the question of the separation of the races in schools. Even where the State statutes have declared point-blank by statute that there shall be no distinction on account of race or color, the suits that have arisen in those States show that the school boards have tried to evade the law.

DIVISION OF PUBLIC SCHOOL FUND

It is commonly believed that the Negro has had and is now getting much more than his share of the public school fund. It is said that the Negro is getting nearly half the money, while he is paying only a very small percentage of the taxes. Thus, the following is the estimate of Mr. J. Y. Joyner, Superintendent of Public Instruction of North Carolina: "Upon the most liberal estimate, it seems that in 1908 the Negroes received for the maintenance of their public schools in North Carolina about twice as much as they paid directly or indirectly for this purpose. I think that this is about in accordance with the experience and observation of those familiar with the administration of the public schools in North Carolina. My

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own opinion is that the white people pay, directly or indirectly, for the education of the Negro more rather than less than one dollar for every dollar that the Negro pays, directly or indirectly for that purpose." Mr. J. D. Eggleston, Jr., Superintendent of Public Instruction of Virginia, estimates that the public school fund for Negroes in that State is \$500,000, of which the Negro pays \$87,000, or less than one-fifth.¹⁶⁰

There have been fitful efforts from time to time to divide the public school fund in proportion to the amount of taxes paid by each race. The most recent and thorough-going effort ¹⁶¹ to have the school fund so apportioned was made by Ex-Governor James K. Vardaman, of Mississippi. But his effort, like that of those before him, came to naught. The white taxpayers of the South have not shown any very evident desire to withdraw their financial aid from the colored public schools. But there has been enough legislation on different phases of the question of the apportionment of the school money to deserve attention.

In Alabama,¹⁶² in 1896, all poll tax money paid by colored persons went to the support of colored schools, and all that paid by white persons, to the support of white schools. The present Code apparently does not require this separation of taxes; but in the provisions for special tax districts ¹⁶³ for school purposes, the law provides that the amount paid by whites and blacks shall be kept separate, presumably meaning that the funds arising from special taxation shall be apportioned according to the amount paid by each race. Though Delaware usually makes an annual appropriation for colored schools, never-

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theless in 1875,¹⁶⁴ and again in 1887,¹⁶⁵ it provided for a tax of thirty cents on the hundred dollars upon the property of colored persons for the maintenance of colored schools.

The legislation of Kentucky with regard to the raising and apportionment of its public school fund has been unique. In 1866,¹⁶⁶ all capitation taxes paid by Negroes and, in addition, a tax of two dollars *per capita* upon Negroes went toward the support of their paupers and the education of their children. In 1869,¹⁶⁷ a vote was taken upon the propriety of levying a tax of fifteen cents on the hundred dollars upon the property of white persons for the support of white schools exclusively. In 1873,¹⁶⁸ a property tax of twenty cents on the hundred dollars and a poll tax of one dollar were levied upon Negroes of McCracken County for the maintenance of their schools. The same method of taxation was adopted for Bowling Green¹⁶⁹ and Catlettsburg¹⁷⁰ and Garrard County.¹⁷¹ As to the last-mentioned place, there was a provision that in the county white and colored school-houses must be not less than a half mile apart, and in towns not less than eight hundred feet. In Bracken County¹⁷² a special tax of twenty-five cents on the hundred dollars was levied upon the property of whites for their schools, not applying to Negroes at all. The constitutionality¹⁷³ of this law was upheld by the Supreme Court of Kentucky on the ground that whatever benefits the Negro is entitled to under the school system he receives as a citizen of Kentucky, not as a citizen of the United States.

In 1874, the same State¹⁷⁴ provided for a uniform

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system of schools for Negroes. The sources of the revenue for the schools were (1) a tax of twenty cents on the hundred dollars upon the property of Negroes, (2) their poll taxes, (3) their dog taxes, (4) taxes on deeds, suits and licenses collected from colored persons, (5) fines, penalties, and forfeitures collected from them, (6) sums received from Congress, provided the apportionment to each colored child did not exceed that to each white child, and (7) gifts, donations, and grants. Colored school-houses must not be erected within one mile of a white school-house in the country and six hundred feet in towns. In 1880, Owensboro ¹⁷⁵ was authorized to levy a tax of thirty cents on the hundred dollars and two dollars on the poll upon Negroes for colored schools, provided the Negroes voted to tax themselves for this purpose. This law was held ¹⁷⁶ unconstitutional by the Federal district court in 1883, the court saying: "If taxes can be distributed according to color or race classification, no good reason why a division might not be made according to the amount paid by each taxpayer, and thus limit the benefits and distribute the protection of the laws by a classification based upon the wealth of the taxpayer. Such distribution would entirely ignore the spirit of our republican institutions and would not be the equal protection of the laws as understood by the people of the State at the time of the adoption of this (the Fourteenth) amendment." The laws of Kentucky of 1874 were held ¹⁷⁷ unconstitutional in 1885. In 1886, Elkton ¹⁷⁸ was authorized to levy a tax of two dollars on the poll and ninety-five cents on the hundred dollars upon Negroes if they voted thus to tax themselves. Apparently the last act of legislation ¹⁷⁹ with regard to the

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school fund in Kentucky was in 1904, when provision was made for a system of graded schools in cities of the fourth class, but the property or polls of one race were not to be taxed for the support of the schools of the other. A recent Kentucky case has held ¹⁸⁰ that, after the regular public school fund of the State has been apportioned among the districts in proportion to the number of children regardless of race, then it is not improper for a district to supplement that fund by a tax on the property of white persons for the further support of white schools and upon the property of Negroes for their schools. Thus, it appears that Kentucky is honeycombed with the special tax districts wherein each race supports its own schools. Whether this arrangement is constitutional or not is still in doubt, as no square decision on the point has yet been rendered by the Supreme Court of the United States.

For some years North Carolina has been exercising the principle of local, special taxation to supplement the general public school fund. In several instances, about 1886, the communities levied the tax only upon the whites for the benefit of white schools, but this was held ¹⁸¹ unconstitutional by the State Supreme Court, and the attempt to thus distinguish between the races does not appear to have been made since. The courts of Kentucky and North Carolina are in conflict, due to the differences in the constitutions of those States, on the question of special taxation by each race for its own schools. The local tax districts in North Carolina have recently been increasing at the rate of about two a day, but the tax is levied upon colored persons as well as white, and all the schools share the benefits.

NOTES

The Constitution of Texas¹⁸² of 1866 provided that all taxes collected from Negroes should go to maintain their public schools, and that it should be the duty of the legislature to encourage schools among these people. This provision, however, does not appear in the later Constitution of Texas.

Thus, one sees that, here and there, particularly in Kentucky, there are precedents for a division of the school fund in proportion to the taxes paid by each race, but there has not been any general movement in this direction. One is justified in concluding that, although the Southern States stand steadfastly for race separation in both public and private schools, they do not desire a division of the public school funds except in proportion to the number of children of school age. It is true that there have been some local legislative acts looking in that direction, and a few sporadic political movements to the same effect; nevertheless, the fact that the local legislation has not become general since the Negro has been practically eliminated from politics and that the political movements have met with such scanty popular support show that the people are satisfied with the present arrangement as to the division of the school fund.

NOTES

¹ Laws of Ky., 1904, pp. 181-82.

² *The Outlook*, vol. 85, pp. 921-23.

³ *The Nation*, vol. 79, pp. 389-90.

⁴ 94 S. W. 623 (1906).

⁵ *Berea College v. Com. of Ky.*, 1908, 211 U. S. 45.

⁶ Pol. Code, 1906, sec. 1662.

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⁷ Laws of Calif., 1880, p. 38; 1885, p. 100; 1891, p. 160; 1893, p. 253; 1903, p. 86. See also Laws of Calif., 1869-70, p. 838; 1909, extra sess., p. 904.

⁸ President Roosevelt's Message to Congress, December 18, 1906, with Secretary Metcalf's Report.

⁹ *The Outlook*, vol. 86, pp. 246-52.

¹⁰ Art. VI, par. 2.

¹¹ *Harper's Weekly*, vol. 51, p. 295; *Current Literature*, vol. 42, p. 237.

¹² Raleigh, N. C., *News and Observer*, Feb. 13, 1909.

¹³ Boston *Evening Transcript*, Feb. 18, 1910.

¹⁴ *Ibid.*, Feb. 15, 1907, p. 8, col. 7.

¹⁵ Laws of O., 1828-29, p. 73.

¹⁶ *Williams v. Directors of Sch. Dist. No. 6*, 1834, Wright's Rep. (O.) 578.

¹⁷ Laws of O., 1847-48, pp. 81-83.

¹⁸ *Ibid.*, 1848-49, pp. 17-18. See Curwen's Revised Stat., II, pp. 1465-66.

¹⁹ *Stewart v. Southard*, 1848, 17 O. 402.

²⁰ *State v. City of Cincinnati*, 1860, 19 O. 178, at p. 196.

²¹ Laws of O., 1852, p. 441.

²² *Van Camp v. Board of Education of Logan*, 1859, 9 O. S. 406.

²³ *Lane v. Baker*, 1843, 12 O. 238.

²⁴ Revised Stat., 1843, p. 314.

²⁵ *Lewis v. Henley*, 1850, 2 Ind. 332.

²⁶ 59 Mass. (5 Cushing) 198 (1849).

²⁷ Revised Stat., 1852, p. 115.

²⁸ Art. XIII, sec. 1.

²⁹ Art. XIV, sec. 256.

³⁰ Laws of Ala., 1868, p. 148.

³¹ *Ibid.*, 1878, p. 136.

³² *Ibid.*, 1884-85, p. 349. See Code, 1907, I, sec. 1757.

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- ³³ Acts of Ark., 1866-67, p. 100.
- ³⁴ *Ibid.*, 1873, p. 423. See Kirby's Digest, 1904, secs. 7536 and 7613.
- ³⁵ Art. XII, sec. 12.
- ³⁶ Laws of Fla., 1895, pp. 96-97. See General Stat., 1906, sec. 3810.
- ³⁷ Laws of Ga., 1866, p. 59.
- ³⁸ Art. VIII, sec. 1.
- ³⁹ Laws of Ga., 1872, p. 69. See Code, 1895, I, sec. 1378.
- ⁴⁰ Laws of Ky., 1869-70, I, p. 127.
- ⁴¹ Art. VI, sec. 187.
- ⁴² Laws of Ky., 1904, pp. 181-82. See Statutes, 1909, secs. 5606-10.
- ⁴³ Title VII, art. 135.
- ⁴⁴ Title VII.
- ⁴⁵ Title VIII.
- ⁴⁶ Laws of La., 1871, pp. 208-10.
- ⁴⁷ *Ibid.*, 1875, pp. 50-52.
- ⁴⁸ *Ibid.*, 1880, pp. 110-11.
- ⁴⁹ Art. 248.
- ⁵⁰ Laws of Md., 1870, pp. 555-56.
- ⁵¹ *Ibid.*, 1872, p. 650. See Laws of Md., 1874, p. 690.
- ⁵² Pub. Gen. Laws, II, art. 77, secs. 124-27.
- ⁵³ Laws of Miss., 1878, p. 103.
- ⁵⁴ Sec. 207.
- ⁵⁵ Code, 1906, sec. 4562.
- ⁵⁶ Art. IX, sec. 2.
- ⁵⁷ Laws of Mo., 1864, p. 126.
- ⁵⁸ *Ibid.*, 1868, p. 170.
- ⁵⁹ *Ibid.*, 1869, p. 86.
- ⁶⁰ Art. IX, sec. 2.
- ⁶¹ Laws of Mo., 1889, p. 226. See Statutes, 1906, secs. 9774-76.

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- ⁶² Art. IX, sec. 2.
- ⁶³ Pub. Laws of N. C., 1901, p. 64.
- ⁶⁴ *Ibid.*, 1903, p. 756.
- ⁶⁵ Revisal of 1905, II, sec. 4086. See Pell's Revisal of 1908, sec. 4086.
- ⁶⁶ Statutes, 1890, secs. 6464-72.
- ⁶⁷ Laws of Okla., 1901, pp. 205-10.
- ⁶⁸ Art. XIII, sec. 3.
- ⁶⁹ Laws of Okla., 1907-08, pp. 694-95. See Statutes, 1908, secs. 6551-56.
- ⁷⁰ Art. X, sec. 10.
- ⁷¹ Booker T. Washington, "The Story of the Negro," 1909, Doubleday, Page & Co., II, p. 38.
- ⁷² Art. XI, sec. 7. See Laws of S. C. 1896, p. 171, and Code, 1902, I, sec. 1231.
- ⁷³ Laws of Tenn., 1865-66, p. 65.
- ⁷⁴ Art. XI, sec. 12.
- ⁷⁵ Laws of Tenn., 1873, p. 46.
- ⁷⁶ *Ibid.*, p. 9. See Shannon's Code, 1896, sec. 1451, and Supplement, 1897-1903, p. 843.
- ⁷⁷ Art. VII, sec. 7.
- ⁷⁸ Laws of Texas, 1876, p. 209.
- ⁷⁹ *Ibid.*, 1884, p. 40.
- ⁸⁰ *Ibid.*, 1893, p. 198.
- ⁸¹ *Ibid.*, 1895, p. 29. See Salyles's Civil Statutes, II, art. 3907, and Supplement, 1897-1906, pp. 421-22.
- ⁸² Laws of Va., 1881-82, p. 37.
- ⁸³ *Ibid.*, 1895-96, p. 352.
- ⁸⁴ Sec. 140. See Pollard's Code, 1904, sec. 1492.
- ⁸⁵ Laws of Calif., 1869-70, pp. 838-39.
- ⁸⁶ Ward v. Flood, 1874, 48 Calif., 36.
- ⁸⁷ Deering's Code and Statutes, I, secs. 1669-71.
- ⁸⁸ Wysinger v. Crookshank, 1890, 23 P. 54.

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- ⁸⁹ Laws of Del., 1879-81, p. 385.
- ⁹⁰ *Ibid.*, 1887-89, pp. 650-51, 655, and 658.
- ⁹¹ *Ibid.*, 1891-93, p. 693.
- ⁹² *Ibid.*, 1898-99, p. 193. See Del. Laws of 1852, as amended 1893, pp. 341 and 348.
- ⁹³ Statutes, 1896, III, p. 3730, sec. 292.
- ⁹⁴ Chase v. Stephenson, 1874, 71 Ill. 383.
- ⁹⁵ People v. Board of Education of Quincy, 1882, 101 Ill. 308.
- ⁹⁶ People v. Board of Education of Upper Alton, 1889, 21 N. E. 187.
- ⁹⁷ People v. Mayor, etc. of City of Alton, 1899, 54 N. E. 421.
- ⁹⁸ Raleigh, N. C., *News and Observer*, Nov. 29, 1906.
- ⁹⁹ 233 Ill. 542 (1908).
- ¹⁰⁰ Boston *Evening Transcript*, Nov. 28, 1908, pt. 2, p. 9, col. 5.
- ¹⁰¹ Laws of Ind., 1869, p. 41.
- ¹⁰² Cory v. Carter, 1874, 48 Ind. 327, at pp. 362-63.
- ¹⁰³ Laws of Ind., 1877, p. 124.
- ¹⁰⁴ State v. Grubbs, 1882, 85 Ind. 213.
- ¹⁰⁵ State v. Mitchell, 1883, 93 Ind. 303.
- ¹⁰⁶ Clark v. Board of Sch. Dirs., 1868, 24 Ia. 266.
- ¹⁰⁷ Smith v. Dirs. of the Ind. Sch. of the Dist. of Keokuk, 1875, 40 Ia. 518; Dove v. Ind. Sch. Dist. of Keokuk, 1875, 41 Ia. 689.
- ¹⁰⁸ General Stat., 1868, chap. 18, art. 5, sec. 75.
- ¹⁰⁹ Laws of Kan., 1876, p. 238.
- ¹¹⁰ *Ibid.*, 1879, p. 163.
- ¹¹¹ Reynolds v. Board of Education of Topeka, 1903, 72 P. 274; Williams v. Board of Education of Parsons, 1909, 99 P. 216.
- ¹¹² Board of Education v. Tinnon, 1881, 26 Kan. 1; Knox

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v. Board of Education of Independence, 1891, 25 P. 616;
Rowles v. Board of Education of Wichita, 1907, 91 P. 88.

¹¹³ Letter from the Superintendent of Schools of Kansas to the Superintendent of Schools of North Carolina. Raleigh, N. C., *News and Observer*, Aug. 24, 1906.

¹¹⁴ Laws of Nev., 1864-65, p. 426.

¹¹⁵ State v. Duffy, 1872, 7 Nev. 342.

¹¹⁶ Laws of N. J., 1881, p. 186.

¹¹⁷ Pierce v. Union Dist. Sch. Trustees, 1884, 46 N. J. L. (17 Vroom) 76.

¹¹⁸ Raleigh, N. C., *News and Observer*, Feb. 18, 1906.

¹¹⁹ Dallas v. Fosdick, 1869, 40 How. Prac. (N. Y.) 249.

¹²⁰ People v. Easton, 1872, 13 Abb. Prac. (N. S.) 159.

¹²¹ People v. Gallagher, 1883, 93 N. Y. 438.

¹²² People v. School Board of Borough of Queens, 1899, 61 N. Y. Sup. 330.

¹²³ Laws of N. Y., 1864, p. 1281.

¹²⁴ *Ibid.*, 1894, II, p. 1288.

¹²⁵ *Ibid.*, 1900, II, p. 1173.

¹²⁶ Laws of O., 1878, p. 513.

¹²⁷ *Ibid.*, 1887, p. 34.

¹²⁸ State v. Board of Education of Oxford, 1887, 2 O. Cir. Ct. Rep. 557.

¹²⁹ Laws of Pa., 1869, p. 160.

¹³⁰ *Ibid.*, 1872, pp. 1048-49.

¹³¹ Com. v. Williamson, 1873, 30 Legal Intelligencer, 406.

¹³² Laws of Pa., 1881, p. 76.

¹³³ Kaine v. Sch. Dirs., 1882, 101 Pa. S. 490.

¹³⁴ Laws of W. Va., 1865, p. 54.

¹³⁵ *Ibid.*, 1871, p. 206; 1872-73, p. 391; 1881, pp. 176-77; 1901, pp. 159-60.

¹³⁶ Art. XII, sec. 8.

¹³⁷ Martin v. Board of Education of Morgan Co., 1896,

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42 W. Va. 514; *Williams v. Board of Education of Fairfax Dist.*, 1898, 45 W. Va. 199.

¹³⁸ Revised Stat., 1887, sec. 3947.

¹³⁹ Revised Stat., 1901, secs. 2179 and 2231.

¹⁴⁰ Laws of Ariz., 1909, pp. 171-72.

¹⁴¹ Art. IX, sec. 8.

¹⁴² Art. IX, sec. 6.

¹⁴³ Acts and Resolves of Mass., 1854-55, pp. 674-75.

¹⁴⁴ Revised Laws, 1902, I, p. 478. See Acts and Resolves of Mass., 1894, p. 609; 1898, p. 453.

¹⁴⁵ Compiled Laws, 1897, II, sec. 4683, p. 1478.

¹⁴⁶ Raleigh, N. C., *News and Observer*, Nov. 22, 1908.

¹⁴⁷ *Booker v. Grand Rapids Medical College*, 1909, 120 N. W. 589.

¹⁴⁸ Revised Laws, 1905, sec. 1403.

¹⁴⁹ Laws of N. M., 1901, p. 147.

¹⁵⁰ U. S. Stat. L., 191, chap. 156, secs. 16-17.

¹⁵¹ 26 U. S. Stat. L., 417-18, chap. 841, sec. 1.

¹⁵² Laws of Fla., 1895, pp. 96-97.

¹⁵³ Laws of Tenn., 1901, p. 9.

¹⁵⁴ Laws of Okla., 1907-08, pp. 694-95.

¹⁵⁵ *Lehew v. Brummell*, 1891, 15 S. W. 765.

¹⁵⁶ *State v. Board of Education of Cincinnati*, 1876, 1 Weekly Law. Bul. 190.

¹⁵⁷ *Reynolds v. Board of Education of Topeka*, 1903, 72 P. 274, at p. 280.

¹⁵⁸ *Board of Education of Richmond Co. v. Cummings*, 1898, 29 S. E. 488.

¹⁵⁹ 175 U. S. 528 (1899).

¹⁶⁰ Raleigh, N. C., *News and Observer*, Sept. 25 and Oct. 10, 1909. See also *The World's Work*, July, 1909.

¹⁶¹ *The International Year-book*, 1907, p. 545.

¹⁶² Code, 1896, secs. 3607-08.

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- ¹⁶³ Code, 1907, I, sec. 1858.
- ¹⁶⁴ Laws of Del., 1875, pp. 82-83.
- ¹⁶⁵ *Ibid.*, 1887-89, pp. 147-48.
- ¹⁶⁶ Laws of Ky., 1867, pp. 94-95.
- ¹⁶⁷ *Ibid.*, 1869, p. 7.
- ¹⁶⁸ *Ibid.*, 1873, p. 509.
- ¹⁶⁹ *Ibid.*, p. 238.
- ¹⁷⁰ *Ibid.*, pp. 193-94.
- ¹⁷¹ *Ibid.*, pp. 554-55.
- ¹⁷² *Ibid.*, adj. sess., pp. 471-72.
- ¹⁷³ *Marshall v. Donovan*, 1874, 10 Bush (Ky.) 681.
- ¹⁷⁴ Laws of Ky., 1873-74, pp. 63-66.
- ¹⁷⁵ *Ibid.*, local, 1879-80, I, pp. 257-59.
- ¹⁷⁶ *Claybrook v. Owensboro*, 1883, 16 Fed. 297, at p. 302.
- ¹⁷⁷ *Dawson v. Lee*, 1885, 83 Ky. 49.
- ¹⁷⁸ Laws of Ky., 1885-86, I, pp. 877-91.
- ¹⁷⁹ *Ibid.*, 1904, pp. 129-31.
- ¹⁸⁰ *Crosby v. City of Mayfield*, 1909, 117 S. W. 316.
- ¹⁸¹ *Pruitt v. Gaston Co. Commissioners*, 1886, 94 N. C. 709; *Riggles v. City of Durham*, 1886, 94 N. C. 800.
- ¹⁸² Art. X, sec. 7.

CHAPTER IX

SEPARATION OF RACES IN PUBLIC CONVEYANCES

THERE is perhaps no phase of the American race problem which has been discussed so much within the last decade as the so-called "Jim Crow" laws, the statutes requiring separate accommodations for white and colored passengers in public conveyances. This arises largely from the fact that these legislative enactments are of general concern, while the other legal distinctions have directly affected only certain classes of each race. Laws prohibiting intermarriage, for instance, concern only those of marriageable age; suffrage restrictions apply only to males of voting age; and statutes requiring separate schools affect immediately only children and youths; but the laws requiring white and colored passengers to occupy separate seats, compartments, or coaches concern every man, woman, and child, who travels, the country over. They affect not only those living in the States where the laws are in force, but the entire traveling public. The white man or the Negro in Massachusetts may not care anything about the suffrage restrictions of South Carolina, but, if he travels through the South, he must experience the requirements of the "Jim Crow" laws.

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ORIGIN OF "JIM CROW"

The phrase "Jim Crow" has become so inseparably affixed to the laws separating the races in public conveyances that two States, North Carolina and Maryland, have indexed the laws on that subject under "J" in some of their annual statutes. The earliest public use of the phrase appears to have been in 1835, when Thomas D. Rice, the first Negro minstrel, brought out in Washington a dramatic song and Negro dance called "Jim Crow." The late actor, Joseph Jefferson, when only four years old, appeared in this dance.¹ In 1841 "Jim Crow" was first used in Massachusetts to apply to a railroad car set apart for the use of Negroes.² The phrase, then, has a somewhat more dignified origin than is ordinarily attributed to it by those who have considered it as only an opprobrious comparison of the color of the Negro with that of the crow.

DEVELOPMENT OF LEGISLATION PRIOR TO 1875

The first "Jim Crow" laws are those of Florida and Mississippi in 1865, and Texas in 1866. The laws³ of Florida provided: "That if any Negro, mulatto, or other person of color shall intrude himself into . . . any railroad car or other public vehicle set apart for the exclusive accommodation of white people, he shall be deemed guilty of a misdemeanor and, upon conviction, shall be sentenced to stand in pillory for one hour, or be whipped, not exceeding thirty-nine stripes, or both, at the discretion of the jury, nor shall it be lawful for any white person to intrude

himself into any railroad car or other public vehicle set apart for the exclusive accommodation of persons of color, under the same penalties." The law ⁴ of Mississippi was as follows: "That it shall be unlawful for any officer, station agent, conductor, or employee on any railroad in this State, to allow any freedman, Negro, or mulatto, to ride in any first-class passenger cars, set apart, or used by, and for white persons; and any person offending against the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof, before the circuit court of the county in which said offence was committed, shall be fined not less than fifty dollars, nor more than five hundred dollars; and shall be imprisoned in the county jail until such fine and costs of prosecution are paid: Provided, that this section of this act shall not apply in the case of Negroes or mulattoes, traveling with their mistresses, in the capacity of nurses." Texas ⁵ simply provided that every railroad company should be required to attach to each passenger train run by it one car for the special accommodation of freedmen.

Other Southern States, perhaps, would have undertaken similar legislation, had the legislatures been left unfettered; but under the Reconstruction régime, a number of the States even passed laws prohibiting discrimination against Negroes in public conveyances. In 1870, the Georgia legislature ⁶ enacted a statute requiring the railroads in the State to furnish equal accommodations to all, without regard to race, color, or previous condition, when a greater amount of fare was exacted than had been exacted before January 1, 1861, which had been at that

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time half-fare for persons of color. Texas,⁷ in 1871, repealed the law of 1866 and prohibited public carriers "from making any distinctions in the carrying of passengers" on account of race, color, or previous condition, making the violation of the law a misdemeanor punishable by a fine of not less than one hundred nor more than five hundred dollars, or imprisonment for not less than thirty or more than ninety days, or both. In 1873, Louisiana⁸ prohibited common carriers from making any discrimination against any citizen of the State or of the United States on account of race or color, and went further still by prohibiting common carriers from other States from making such discriminations while in the State. Out of this latter provision arose the great case of *Hall v. DeCuir*, which will be discussed later. In 1874, Arkansas⁹ prohibited any public carrier from making any rules for the government or control of his business which should not affect all persons alike, without regard to race or color.

In the meantime, some of the States outside the South were taking steps to adjust the privileges of persons of color. In 1866, Massachusetts¹⁰ made it unlawful "to exclude persons from or restrict them in . . . any public conveyance . . . except for good cause." The following year, Pennsylvania¹¹ enacted a statute prohibiting railroads from excluding persons from their cars or requiring them to ride in different parts of the cars on account of color or race, also prohibiting the conductor or other agent of the railroad from throwing the car off the track to prevent such persons from riding. This law was passed just a few days before the famous case of *West Chester*

LEGISLATION BETWEEN 1865 AND 1881

and Philadelphia Railway Company v. Mills was decided, which case will also be discussed later.

A statute of Delaware¹² of 1875, as has been seen, declared that the carriers of passengers might make such arrangements in their business as would, if necessary, assign a particular place in their cars, carriages, or boats to such of their customers as they might choose to place there, and whose presence elsewhere would be offensive to the major part of the traveling public, where their business was conducted; but the accommodations must be equal for all if the same price for carriage was required from all.

LEGISLATION BETWEEN 1865 AND 1881

Before considering the "Jim Crow" laws of the Southern States, it will be instructive to look into some of the court decisions between 1865 and 1881, the latter being the date of adoption of the first "Jim Crow" law of the second period, to see what steps the railroad, street car, and steamboat companies had taken to separate the races, in the absence of State legislation upon the subject.

In 1865, a colored woman ejected from a street car in Philadelphia¹³ brought action against the conductor, who pleaded that there was a rule established by the road superintendent that Negroes should be excluded from the cars. The court held that the conductor had no right to eject a passenger on account of race or color, and that a regulation of the company would not be a defence to the action.

Just a few days after the Pennsylvania legislature

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passed the act prohibiting discriminations against persons of color in public conveyances, to which reference has been made, the Supreme Court of the State ruled ¹⁴ that it was not an unreasonable regulation of the railroad company to separate the passengers so as to promote personal comfort and convenience. This is interesting because it is the earliest case found supporting the legality of the separation of races in public conveyances. Since the case arose before the Civil Rights Bill of the Commonwealth was adopted, it does not purport to rule upon the constitutionality of that act.

In San Francisco,¹⁵ in 1868, a street car conductor refused to stop for a colored woman, saying, "We don't take colored people in the cars," whereupon she brought an action against the company and was awarded damages by the lower court. Here there is an implication that the railroad company had a regulation excluding persons of color from street cars.

In 1870, the Chicago and Northwestern Railway Company ¹⁶ refused to admit a colored woman to the car set apart for ladies and gentlemen accompanying them. Whereupon she brought an action and recovered two hundred dollars damages. It does not appear from the case that the railroad had set apart any car or part of a car for the exclusive accommodation of colored persons.

A steamboat company in Iowa, in 1873, had a regulation that colored passengers should not eat at the regular tables, but at a table on the "guards" of the boat. The Supreme Court of that State held ¹⁷ that this rule was unreasonable and, therefore, illegal.

The first case to reach the Supreme Court of the

United States involving the separation of white and colored passengers on cars was one brought against the Washington, Alexandria, and Georgetown Railroad Company, in 1873. This road was chartered by Congress in 1863 with the provision that no person should be excluded from the cars on account of color. A Negro woman, with an ordinary first-class ticket, was made to ride in a separate coach precisely like that used by the white passengers. The court ruled ¹⁸ that the Act of 1863 meant that persons of color should travel in the same cars as white persons without any distinction being made; that, therefore, the law was not satisfied by the company's providing cars assigned exclusively to persons of color, though they were as good as those assigned to white passengers.

In 1869, the Louisiana ¹⁹ legislature passed a law prohibiting railroad, street car, and steamboat companies from making any discrimination on account of race or color. In the often-cited case of *Hall v. DeCuir*,²⁰ a test case arising under this act in 1875, the Supreme Court ruled that the Louisiana act was unconstitutional because it was an interference with interstate commerce. Chief Justice Waite, in delivering the opinion of the court, said: "If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship." This case has stood as a warning to the Southern States that they must be careful to mention in their "Jim Crow" laws that they apply only to intrastate passengers. But, as will be seen later, though this case has not been overruled, it has been refined upon.

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In a case²¹ arising in the Federal District Court of Texas in 1877, it was held that for a railroad employee to deny to a passenger the right to ride in the only car appropriated for the use of ladies, because she was a colored woman, was a violation of the Civil Rights Bill. But the judge, in charging the jury at the trial, said that, if there were two cars equally fit and appropriate, then the white and colored passengers might be separated.

The above are only a few of the many cases which arose between 1865 and 1881, involving the separation of white and colored passengers; they are cited to show that, in the absence of legislative authority, many of the public conveyance companies had regulations of their own separating the races. The "Jim Crow" laws, in other words, coming later, did scarcely more than to legalize an existing and widespread custom.

SEPARATION OF PASSENGERS ON STEAMBOATS

As already suggested, the "Jim Crow" laws apply to three classes of vehicles, namely: steamboats, railroad cars, and street cars. There is comparatively little legislation about white and colored passengers on steamboats. North Carolina²² is the only State to include steamboats in the regular "Jim Crow" law. It requires all steamboat companies engaged as common carriers in the transportation of passengers for hire to provide separate but equal accommodations for the white and colored races of all steamboats carrying passengers. The violation of this law is punishable by a fine of one hundred dollars; each day is considered a separate offence.

SEPARATION OF PASSENGERS ON STEAMBOATS

On February 9, 1900, the Virginia²³ legislature enacted a statute requiring the separation of white and colored passengers on all steamboats carrying passengers and plying in the waters within the jurisdiction of the State in the sitting, sleeping, and eating apartments, so far as the "construction of the boat and due consideration for comfort of passengers" would permit. There must be no difference in the quality of accommodations. The law makes an exception of nurses and other attendants traveling with their employers, and officers in charge of prisoners. For disobeying the law, the boat officer is guilty of a misdemeanor punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars. Any passenger wilfully disobeying the law is guilty of a misdemeanor punishable by a fine of not less than five dollars nor more than fifty dollars or by imprisonment for not less than thirty days, or both. The boat officer may eject an offending passenger at any landing place, and neither he nor the steamboat company will be liable. In 1901, the above law²⁴ was made more stringent by omitting the provision about the construction of the boat and consideration for the comfort of the passengers, quoted above. In 1904, South Carolina²⁵ required all ferries to have separate cabins for white and colored passengers.

The above legislation seems to be the only legislation as to steamboats up to the present; but it does not measure the separation of the races on steamboats, inasmuch as the companies in the various States have adopted regulations requiring separate accommodations for the races. This custom applies to interstate as well as to intrastate travel. The steamers plying between Boston and the ports

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of the South, for instance, provide separate dining tables, separate toilet rooms, and separate smoking rooms for the white and colored passengers. This regulation of interstate travel is upheld by two Federal cases, one in Georgia ²⁶ in 1879 and the other in Maryland ²⁷ in 1885, which held in substance, that, inasmuch as Congress has enacted no law which forbids interstate common carriers from separating white and colored passengers so long as the accommodations are equal, during congressional inaction, the companies may make their own regulations.

SEPARATION OF PASSENGERS IN RAILROAD CARS

With the exception of the transient "Jim Crow" laws of Mississippi, Florida, and Texas of 1865-67, the first State to adopt a comprehensive law separating the white and colored passengers on railroad cars was Tennessee ²⁸ which did so in 1881. The statute of that State stood alone until 1887, when a series of "Jim Crow" laws were enacted by the States in the following order: Florida,²⁹ 1887; Mississippi,³⁰ 1888; Texas,³¹ 1889; Louisiana,³² 1890; Alabama,³³ Kentucky,³⁴ Arkansas,³⁵ and Georgia,³⁶ 1891. For some years thereafter the subject remained untouched by the legislatures, save an amending statute now and then; but in 1898-99, the other Southern States began to fall into line: South Carolina,³⁷ 1898; North Carolina,³⁸ 1899; Virginia,³⁹ 1900; Maryland,⁴⁰ 1904; Oklahoma,⁴¹ 1907. It appears that Missouri is the only Southern State which has not separated the races in railroad cars.

The details of the "Jim Crow" laws as to railroads

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are very nearly the same in all the Southern States. They require white persons, on the one hand, and "Negroes," "persons of color," "persons of African descent," etc., on the other, to occupy separate seats, compartments, or coaches. The legal meaning of the above-mentioned phrases has already been considered. It is safe to say, as the Arkansas statute does declare, that, if one has a visible and distinct admixture of African blood, he must accept the accommodations furnished colored passengers.

Interstate and Intrastate Travel

The first great question that arises is the extent of application of the laws. The statutes declare that they apply to all railroads doing business in the State. But just what does this mean? It has been generally understood and the principle has been confirmed by judicial decisions⁴² that States may pass laws separating passengers going one from one point to another in the same State. But how about passengers coming from or going to points outside the State? Suppose, for instance, a colored passenger were to board a train at Philadelphia for Evansville, Indiana, and go through Maryland, West Virginia, and Kentucky. Pennsylvania and West Virginia have no "Jim Crow" laws; Maryland and Kentucky have. When the colored passenger reaches the Maryland line, must he enter a car set apart for colored people? When he reaches the West Virginia line, may he go back into the coach with white passengers? When, again, he reaches the Kentucky line, will he be forced to return to the car set apart for his race? And, finally, when he comes to Indiana, may he once more return to the car for white passengers? Or,

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suppose a railroad from Ohio to Indiana has only a few miles of its track in Kentucky and only two depôts in that State. Must the railroad furnish separate accommodations for the white and colored passengers going between those two points in Kentucky? If these questions had been asked thirty years ago or at the time of the *Hall v. DeCuir* case, there is no doubt that the Federal courts would have held that it was an unwarranted interference with interstate commerce or would lead to too much confusion.

The law of Alabama of 1891 contained the provision that "this act shall not apply to cases where white or colored passengers enter this State upon such railroads under contract for their transportation made in other States where like laws to this do not prevail." Since these laws, however, have become so prevalent throughout the South, the courts seem to have swung over to the side of public opinion. In 1889, the Supreme Court of Mississippi held⁴³ that though the "Jim Crow" law of that State applied only to intrastate travel, it was not an unwarranted burden upon interstate railroads to require them to furnish separate accommodations for the races as soon as they came across the State line.

In 1894, the "Jim Crow" law of Kentucky was declared unconstitutional by the Federal Circuit Court⁴⁴ because the language of the acts was so comprehensive as to embrace all passengers, whether their passage commenced or ended within the State or otherwise and thus interfered with interstate commerce. Four years later, however, the Court of Appeals⁴⁵ of Kentucky, considering the same statute, ruled that the law of that State was not in violation of the Fourteenth Amendment or the "interstate

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commerce clause" of the Federal Constitution, arguing that, if it did apply to interstate passengers, which was not conceded, it would be construed to apply only to transportation within the State. Under this latter ruling apparently the colored passenger going from West Virginia to Indiana through Kentucky would have to ride in the car provided for his race in that State.

The same year, 1898, the Supreme Court ⁴⁶ of Tennessee held that it was a proper exercise of the police power to require even interstate passengers to occupy separate accommodations while in that State. The last case ⁴⁷ upon this point, decided April 16, 1907, held that a railroad company may, independently of statute, adopt and enforce rules requiring colored passengers, although they are interstate passengers, to occupy separate coaches or compartments.

Thus the matter stands. In the absence of a recent United States Supreme Court decision upon the point, it would be unsafe to make a generalization. But it is clear that there has been, in the point of view of the Federal judiciary, a reaction from the extreme doctrine of *Hall v. DeCuir*. All the lower courts, both State and Federal, are inclined to make the laws apply to all passengers, both intrastate and interstate, so long as they are within the borders of the particular State.

Sleeping Cars

In a number of the "Jim Crow" laws there are special provisions about Pullman cars. Oklahoma and Texas provides that carriers may haul sleeping or chair cars for the exclusive use of either race separately, but not jointly.

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Georgia goes farthest in legislation on this point. In 1899, the legislature provided that, in assigning seats and berths on sleeping cars, white and colored passengers must be separated; but declared that nothing in the act should be construed to compel sleeping-car companies to carry persons of color in sleeping or parlor cars. The act does not apply to nurses and servants with their employers, who may enter and ride in the car with their employers. The conductors are made special policemen to enforce the law, and the failure or refusal to do so is punishable as a misdemeanor. The "Jim Crow" laws in Maryland, North Carolina, and Virginia do not apply to Pullman cars or to through express trains; nor, in South Carolina, to through vestibule trains.

The Court of Appeals of Texas,⁴⁸ in 1897, held that a colored passenger in a Pullman car, going from a point outside of Texas into that State, might be compelled, upon reaching the Texas line, to enter a Pullman car set apart for passengers of his own race, provided the accommodations were equal. This decision is in harmony with those already considered with reference to day coaches.

Waiting-Rooms

Three States, Arkansas, Louisiana, and Oklahoma, require separate waiting-rooms at railroad depôts. In Mississippi, the railroad commission was given power in 1888 to designate separate waiting-rooms, if it deemed such proper. In most, if not all, of the other Southern States, separate waiting-rooms are provided by the railroad companies on their own initiative, and this action on their part was held constitutional ⁴⁹ in South Carolina in 1893.

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The most recent legislation along this line was an act of South Carolina of February 23, 1906, requiring a separation of the races in all station restaurants and eating-houses, imposing a heavy fine for its violation. It is probable that the necessity or propriety of this law was suggested by the disturbance which arose at Hamlet, North Carolina, near the South Carolina line, when the proprietor of the Seaboard Air Line Railway eating-house at that place allowed a party of Negroes, one of whom was Dr. Booker T. Washington, to eat in the main dining room, while the white guests were fed in a side room.

Trains to which Laws do not Apply

There are certain classes of trains to which the "Jim Crow" laws do not apply. In Maryland, Oklahoma, Texas, and Virginia, they do not apply to freight trains carrying passengers in the caboose cars. South Carolina exempts narrow-gauged roads from the requirements of the law. North Carolina gives its railroad commissioners power to exempt branch lines and narrow-gauged roads if, in their judgment, separation is unnecessary to secure the comfort of passengers. South Carolina provides that, where a railroad is under forty miles in length and operates both a freight and a passenger train daily, the law applies only to the passenger train. These two States also except relief trains in case of accident. Whether there is statutory exemption or not, the railway company cannot be held responsible for not separating the passengers in case of an accident.⁵⁰ Oklahoma allows the running of extra or special trains or cars for the exclusive accommodation of either race, if the regular trains or cars are oper-

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ated upon regular schedule. Texas provides that the provisions of its act shall not apply to any excursion train run strictly as such for the benefit of either race.

Passengers to whom Law does not Apply

Certain classes of passengers are exempt from the laws. There is, for instance, an exemption in favor of nurses attending the children or sick of the other race in Florida, Georgia, Kentucky, Louisiana, Maryland, North Carolina, South Carolina, Texas, and Virginia. The Florida provision is that nothing in the act shall be construed to prevent female colored nurses having the care of children or sick persons from riding in cars for white passengers. North Carolina excepts "Negro servants in attendance on their employers." These two qualifications sound innocent enough, but probably upon a test they would be declared unconstitutional. It would be considered class legislation in that *colored* nurses and *Negro* servants are specifically mentioned instead of exempting nurses and servants in general. In fact, the point has been decided in the case of street-car provisions with similar wording.

Arkansas, Kentucky, Maryland, Oklahoma, Texas, and Virginia expressly exempt the employees of a railroad in the discharge of their duty from the requirements of the "Jim Crow" laws. Where such exemption is not so made in the statute, it must be taken for granted, for it would be manifestly unreasonable to prohibit a white conductor from going into the colored coach to collect tickets, or a colored porter from going into the coach for white passengers to regulate the ventilation or for any other purpose of his employment. It may be noted, how-

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ever, that in States where these laws apply, the white conductor usually assists the white passengers in entering and leaving the cars, while colored porters attend to the colored passengers.

Most of the States provide that the laws do not apply to officers in charge of prisoners. Arkansas declares that "officers accompanying prisoners may be assigned to the coach or room to which said prisoners belong by reason of race." Louisiana, on the contrary, exempts prisoners in the charge of officers from the "Jim Crow" laws. The South Carolina law exempts lunatics as well. The law of Kentucky exempts "officers in charge of prisoners." When, in a case which arose in Kentucky, a sheriff went to take a Negro lunatic over the road, the conductor required the lunatic to stay in the colored coach, and gave the sheriff the choice of staying with the lunatic or leaving him and riding in the car for white passengers. The court⁶¹ upheld the action of the conductor, ruling that the exemption applied only to the officers, not to the prisoners. The law has the same effect as if it said that the officer should ride in the car set apart for the race of the prisoner or lunatic, because it is his duty to guard his charge, and, if the prisoner or lunatic must stay in the car for his race, the officer must stay there with him. North Carolina, South Carolina, and Maryland exempt prisoners from the requirements of the "Jim Crow" laws.

Nature of Accommodations

As to the nature of railroad accommodations, all "Jim Crow" laws provide, in substance, that the accommodations for white and colored passengers must be equal for

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both races. Florida provides that the coaches for colored passengers (with first-class tickets) must be equally good and provided with the same facilities for comfort as those for white passengers with first-class tickets. Kentucky, Maryland, and Virginia prohibit any difference in quality, convenience, or accommodation. Tennessee provides that the first-class coaches for colored passengers must "be kept in good repair, and with the same convenience and subject to the same rules governing other first-class cars, preventing smoking and obscene language."

There is no one point upon which the courts are more in accord than that there is no ground of action so long as the accommodations are substantially equal.⁵² The great working principle was enunciated in 1885 in the Circuit Court ⁵³ of Tennessee in the doctrine that equality of accommodation does not mean identity of accommodation. And, indeed, the railroad company is not liable for damages even for inequality of accommodation, unless it is proved that the plaintiff actually sustained damages by such inequality.⁵⁴

Means of Separation

The actual separation of the races is accomplished by requiring railroads to furnish on each passenger train either separate cars or one car divided into separate compartments by a partition. Each State gives the choice. In case of the division of the car into compartments, the partition must, in Arkansas, Oklahoma, and Kentucky, be made of wood; in Kentucky, Maryland; Oklahoma, and Texas, it must be "substantial"; and in Maryland and Texas, it must have a door in it. Arkansas requires only a

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partitioned car on roads less than thirty miles long, but separate cars on longer roads, though a train on any road may carry one partitioned car.

Maryland and North Carolina provide that, in case the car or compartment for either race becomes filled and no extra cars can be obtained and the increased number of passengers could not have been foreseen, the conductor may assign a portion of the car or compartment for one race to the passengers of the other race.

Designation of Separation

Several States specify a means by which the public shall be notified of the existence of the "Jim Crow" requirements. Arkansas requires the law to be posted in each coach and waiting-room; Louisiana, in each coach and ticket-office; Texas, in each coach and depôt. In Kentucky, Maryland, Oklahoma, and Texas, each coach or compartment must bear in some conspicuous place appropriate words, in plain letters, to indicate the race for which it was set apart.

Punishment for Violating Law

Certain liabilities are incurred for the violation of the "Jim Crow" laws. The three parties concerned are the passenger, the conductor or manager of the train, and the railroad company itself. If a passenger refuses to occupy the coach or compartment to which he, by his race, belongs, the conductor may refuse to carry him and may eject him if he is already on the train; and for this neither the conductor nor the railroad company is liable. In Georgia and Texas, conductors are given express power

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to enforce the law, and in other States the power is implied. Some States punish passengers for wilfully riding in the wrong car by a fine ranging from a minimum of five dollars in Maryland and Texas to a maximum of one thousand dollars in Georgia, or imprisonment from twenty days in Louisiana to six months in Georgia.

The conductor is liable for two kinds of offences: (1) for assigning a passenger to a car or compartment to which he does not by race belong, and (2) for failing to separate passengers. Most of the States consider the two violations as one. Only Arkansas and Louisiana prescribe separate punishments for assigning the passenger to the wrong car—a fine of twenty-five dollars in Arkansas and a fine of twenty-five dollars or twenty days' imprisonment in Louisiana. The punishment for refusing to enforce the law is a fine varying from a minimum of five dollars in Texas to a maximum of one thousand dollars in Georgia, or, in a few States, imprisonment of varying length. In Texas, the fines collected are applied to the common school fund of the State.

The fine imposed upon railroad companies for failing or refusing to furnish separate accommodations, varies between twenty-five dollars and one thousand dollars for each offence, and for this purpose each trip that the train makes is considered a separate offence. If, however, the railroad company provides the required separate cars or compartments and the conductor fails to enforce the law or violates its provisions, it is the conductor, not the company, who is liable.⁵⁵

SEPARATION OF PASSENGERS IN STREET CARS

Separation of Postal Clerks

A special question has arisen out of the Federal postal cars on which both white and colored clerks are employed. At present, they are obliged to sleep in the same cars, and at the terminals of long runs dormitories are provided for them, but without any race separation. The post-office department has said that such regulation is beyond its control.⁵⁶ Thus the matter stands, with a growing discontent on the part of the white postal clerks to be so intimately associated with the colored clerks.

The "Jim Crow" laws in the South, so far as the railroads are concerned, are very nearly complete. Missouri, as has been said, is the only one of the Southern States which has not, by express enactment, separated the races.

SEPARATION OF PASSENGERS IN STREET CARS

The third division of the subject is the separation of races in street cars. This is a field of much more active legislation than any of the preceding, in which much has been done recently and in which much more is likely to be done.

Of the thirteen separate coach laws just considered, six of them—those of Alabama, Arkansas, Louisiana, Mississippi, South Carolina, and Texas—except street railroads from their application. Georgia and Oklahoma alone make their laws all inclusive, embracing electric and street cars as well as railroad coaches. It is safe to assume that the laws of the other States refer only to railroad coaches.

SEPARATION OF RACES IN PUBLIC CONVEYANCES

Present Extent of Separation

With the exception of the early law of Georgia⁵⁷ of 1891, the "Jim Crow" street car laws came in with the new century. So far, eight of the Southern States have passed general statutes to separate the races on street cars, in the following order: Georgia,⁵⁷ 1891; Louisiana,⁵⁸ 1902; Mississippi,⁵⁹ 1904; Tennessee,⁶⁰ and Florida,⁶¹ 1905; Virginia,⁶² 1906, and North Carolina,⁶³ and Oklahoma,⁶⁴ 1907. The statute of Arkansas,⁶⁵ of 1903, might be included in the above list, but it applies only to cities of the first class. Some States passed laws of special application before they made them general. Thus, in 1902, the legislature of Virginia⁶⁶ separated the white and colored passengers on street cars going between Alexandria and points in Fairfax and Alexandria Counties; and in 1901, between Richmond and Seven Pines. And so Tennessee,⁶⁷ in 1903, made the regular separate coach law apply to street cars in counties having 150,000 inhabitants or over, as shown by the census of 1900 or any subsequent Federal census. Memphis only came within this law. In 1905, South Carolina⁶⁸ required the separation of the races on "electric railways outside of the corporate limits of cities and towns." This State has not yet made the law general.

The extent of legislation at present is as follows: Georgia and Oklahoma, by their regular "Jim Crow" laws, require the white and colored passengers on street cars to be separated. Louisiana, Mississippi, Florida, Tennessee, Virginia, and North Carolina have separated the races by statutes specially applicable to street cars. Arkansas, by statute, requires a separation in cities of the

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first class; and South Carolina, on suburban lines. Maryland, South Carolina, Alabama, Texas, Kentucky and Missouri do not, by statute, require the races to be separated on street cars in cities. But the absence of legislative enactments does not mean at all that races are not actually separated on street cars. In order to find out the extent of actual separation, the author made inquiry of the mayors of every city of 10,000 or more inhabitants in the Southern States and in West Virginia and Kansas. Some generalizations may be made from the almost complete number of replies received. It may be assumed that the races are separated in the above-mentioned States which have statutes on the subject. It appears that the white and colored passengers are *not* separated on the street cars of any of the cities of Kansas, Kentucky, Maryland, Missouri, and West Virginia. In the absence of State laws, either the municipal authorities or the street railway companies themselves provide for and require separation in the cities of Alabama and South Carolina. Thus, though there is no ordinance on the subject in Charleston, South Carolina, separation is required by the company itself.

Method of Separation

The city ordinances and regulations requiring separation on street cars are practically the same as the State statutes on the subject. The ordinances, regulations, and statutes all require that the accommodations for passengers of both races shall be equal. The three methods of separation are (1) separate cars, (2) partitioned cars, and (3) seats assigned to each race. The only city that un-

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qualifiedly requires separate cars is Montgomery, Alabama. The ordinance was passed October 15, 1906, over the mayor's veto, he vetoing it because he believed it would be impracticable. When the law went into effect, November 23, the service was materially reduced because of the scarcity of cars.⁶⁹ The State laws of Florida, Louisiana, and Mississippi give the choice of using two or more cars or partitioned cars. A number of the ordinances require that the cars be divided either by movable screens or partitions. They are movable so as to apportion the seating capacity to the requirements of each race. But in by far the greatest number of cases, the separation is accomplished by the conductor assigning white and colored passengers to different seats. Practically without exception, the colored passengers are required to be seated from the rear to the front of the car; the white, from the front to the rear. On railroad cars, the colored passengers are almost invariably assigned to the front compartments. The colored passengers on street cars are seated in the rear in order—to give the reason as stated by the mayor of Birmingham, Alabama—to do “away with the disagreeable odors that would necessarily follow the breezes.” In the closed cars of that city, however, the colored passengers are seated in front so as to give the white passengers the rear for smoking. In other cities, the two rear seats are reserved for smoking, so the colored passengers begin to sit on the third seat from the rear. As the car fills, the races get nearer and nearer to one another. North Carolina provides that white and colored passengers shall not occupy contiguous seats on the same bench. Virginia, likewise, prohibits white and colored passengers from

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sitting side by side on the same bench unless all the other seats are filled. The conductor has the power to require passengers to change their seats as often as is needful to secure actual separation of the races. The laws do not prohibit the running of special cars exclusively for either race, provided the regular cars are run.

The cars or compartments are to be clearly designated to show to which race they belong. Several statutes and ordinances require that the placard "WHITE" or "COLORED," in plain letters, not less than two inches high, shall be upon each end of the car or compartment, or upon the sides of the open cars. A recent case⁷⁰ in Mississippi would seem to hold that the sign must be large enough to be seen in all parts of the car. The laws of Mississippi and Louisiana require that the law be posted in the car; in Virginia, the substance of the law is posted in the car. In Houston, Texas, the race to which the seat belongs is posted on the back of the seat. In several cities, any one tampering with such a sign will be punished by a heavy fine.

The law of North Carolina probably contains a fatal defect in that it requires separation "as far as practicable." Of course, this would allow the conductors or companies to make numberless exceptions. As a matter of fact, most of the North Carolina cities had been contemplating such a separation, and, when the law went into effect the first of April, 1907, were ready to regard and enforce it.

Enforcement of Laws

In practically all of the cities, the street-car conductors and motormen are special policemen to enforce the law.

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For the ejectment of a wilfully disobedient passenger, they incur no penalty either upon themselves or the company. North Carolina provides that the conductor shall not be liable if he makes the mistake of assigning a passenger to the wrong seat. In several of the cities, it is the duty of the regular police officers to arrest passengers whom they see riding in the wrong cars. The penalty upon the conductor for knowingly failing or refusing to enforce the law varies all the way from a minimum fine of one dollar in Montgomery, Alabama, to five hundred dollars in Jacksonville, Florida, or imprisonment from one to ninety days. The liability of the company is correspondingly heavy in proportion. Each trip made without providing for the requirements of the law is expressly declared a separate offence. In Pensacola, Florida, the fine upon the company for not furnishing separate accommodations is fifty dollars a day.

When a passenger consciously disobeys the law, he may be fined; and if he insists upon occupying the wrong seat, the conductor may eject him from the car. According to the Virginia law, "in case such passenger ejected shall have paid his fare upon said car, he shall not be entitled to any part of said fare."

Exemptions

The only phase of these "Jim Crow" street-car laws which has given rise to any serious discussion is the question of the exemptions from application. Most of the States and cities simply except nurses of one race in attendance upon the children or sick of the other race, the nurse going into the car to which the child or sick person

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belongs. Of course, the street-car employees are excepted, and Virginia excepts officers in charge of prisoners and lunatics. But Florida and North Carolina declared that the law should not apply to *colored* nurses in attendance upon *white* children or *white* sick people; and Augusta, Georgia, has the same in its ordinance. The constitutionality of the Florida law was tested five years ago in the Supreme Court ⁷¹ of that State, and was declared to violate the Fourteenth Amendment, the court, in its opinion, saying: "It gives to the Caucasian mistress the right to have her child attended in the Caucasian department of the car by its African nurse, and withholds from the African mistress the equal right to have her child attended in the African department by its Caucasian nurse." This is the same discrimination as to the invalid adult Caucasian attended by a colored nurse. As soon as the Florida State law was declared unconstitutional, the cities passed ordinances making the provision apply to nurses of either race. The North Carolina law was never tested, for it was amended before a test case reached the courts. The North Carolina legislature ⁷² of 1909 obviated all possible difficulty by amending its law to the effect that the nurses of the children or sick or infirm of one race might ride in the car set apart for the race of the infant or sick or infirm person so attended.

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¹ *Century Dictionary*, I, p. 546.

² *Ibid.*, IV, p. 3233.

³ *Laws of Fla.*, 1865, p. 24.

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- ⁴ Laws of Miss., 1865, pp. 231-32.
- ⁵ Laws of Texas, 1866, p. 97.
- ⁶ Laws of Ga., 1870, pp. 427-28.
- ⁷ Laws of Texas, 1871, 2d sess., p. 16.
- ⁸ Acts of La., 1873, pp. 156-57.
- ⁹ Acts of Ark., 1873, pp. 15-19.
- ¹⁰ Acts and Resolves of Mass., 1866-67, p. 242.
- ¹¹ Laws of Pa., 1867, pp. 38-39.
- ¹² Laws of Del., 1875-77, p. 322.
- ¹³ *Derry v. Lowry*, 1865, 6 Phila. Rep. 30.
- ¹⁴ *West Chester and Phila. Ry. Co. v. Mills*, 1867, 55 Pa. S. 209.
- ¹⁵ *Pleasant v. N. B. & M. Ry. Co.*, 1868, 34 Calif. 586.
- ¹⁶ *C. & N. W. Ry. Co. v. Williams*, 1870, 55 Ill. 185.
- ¹⁷ *Coger v. N. W. Union Packet Co.*, 1873, 37 Ia. 145.
- ¹⁸ *Ry. Co. v. Brown*, 1873, 17 Wall, 445.
- ¹⁹ Acts of La., 1869, p. 37.
- ²⁰ 95 U. S. 485, at p. 489 (1875).
- ²¹ *U. S. v. Dodge*, 1877, Fed. Case No. 14,976.
- ²² Pub. Laws of N. C., 1899, pp. 539-40.
- ²³ Acts of Va., 1899-1900, p. 340.
- ²⁴ *Ibid.*, extra sess., 1901, pp. 329-30.
- ²⁵ Acts of S. C., 1904, pp. 438-39.
- ²⁶ *Green v. "City of Bridgeton,"* 1879, Fed. Case No. 5,754.
- ²⁷ "The Sue," 1885, 22 Fed. 843.
- ²⁸ Laws of Tenn., 1881, pp. 211-12.
- ²⁹ Laws of Fla., 1887, p. 116.
- ³⁰ Laws of Miss., 1888, pp. 45 and 48.
- ³¹ Laws of Texas, 1889, pp. 132-33; 1891, pp. 44-45 and 165.
- ³² Acts of La., 1890, pp. 152-54; 1894, pp. 133-34.
- ³³ Acts of Ala., 1890-91, pp. 412-13.

- ³⁴ Acts of Ky., 1891-92-93, pp. 63-64.
- ³⁵ Acts of Ark., 1891, pp. 15-17; 1893, pp. 200-01.
- ³⁶ Laws of Ga., 1891, I, pp. 157-58; 1899, pp. 66-67.
- ³⁷ Acts of S. C., 1898, pp. 777-78; 1903, p. 84; 1906, p. 76.
- ³⁸ Pub. Laws of N. C., 1899, pp. 539-40; 1907, pp. 1238-39; 1909, p. 1256.
- ³⁹ Acts of Va., 1899-1900, pp. 236-37.
- ⁴⁰ Laws of Md., 1904, pp. 186-87.
- ⁴¹ Laws of Okla., 1907-08, pp. 201-04.
- ⁴² L. N. O. & T. Ry. Co. v. State, 1889, 6 S. 203; Plessy v. Ferguson, 1896, 163 U. S. 537; O. Val. Ry. Rec. v. Lander, 1898, 47 S. W. 344; C. & O. Ry. Co. v. Com. of Ky., 1899, 51 S. W. 160.
- ⁴³ L. N. O. & T. Ry. Co. v. State, 1889, 6 S. 203.
- ⁴⁴ Anderson v. L. & N. Ry. Co., 1894, 62 Fed. 46.
- ⁴⁵ O. Val. Ry. Rec. v. Lander, 1898, 47 S. W. 344.
- ⁴⁶ Smith v. State, 1898, 46 S. W. 566.
- ⁴⁷ Chiles v. C. & O. Ry., 1907, 101 S. W. 386.
- ⁴⁸ Pullman-Palace Car Co. v. Cain, 1897, 40 S. W. 220.
- ⁴⁹ Smith v. Chamberlain, 1893, 17 S. E. 391.
- ⁵⁰ C. & O. Ry. Co. v. Com. of Ky., 1905, 84 S. W. 566.
- ⁵¹ L. & N. Ry. Co. v. Catron, 1897, 43 S. W. 443.
- ⁵² West Chester and Phila. Ry. Co. v. Mills, 1867, 52 Pa. S. 209; U. S. v. Dodge, 1877, Fed. Case No. 14,976; Murphy v. W. & A. Ry. Co., 1885, 23 Fed. 637; Logwood v. M. & C. Ry. Co., 1885, 23 Fed. 318; Houck v. S. Pac. Ry. Co., 1888, 38 Fed. 226; Plessy v. Ferguson, 1896, 163 U. S. 537.
- ⁵³ Logwood v. M. & C. Ry. Co., 1885, 23 Fed. 318.
- ⁵⁴ Norwood v. G. H. & S. A. Ry. Co., 1896, 34 S. W. 180.
- ⁵⁵ L. & N. Ry. Co. v. Com. of Ky., 1896, 37 S. W. 79.
- ⁵⁶ Raleigh, N. C., *News and Observer*, March 12, 1907.
- ⁵⁷ Laws of Ga., 1891, I, pp. 157-58.
- ⁵⁸ Acts of La., 1902, pp. 89-90.

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- ⁵⁹ Laws of Miss., 1904, pp. 140-41.
- ⁶⁰ Acts of Tenn., 1905, pp. 321-22.
- ⁶¹ Laws of Fla., 1905, pp. 99-100.
- ⁶² Acts of Va., 1906, pp. 92-94.
- ⁶³ Pub. Laws of N. C., 1907, pp. 1238-39.
- ⁶⁴ Laws of Okla., 1907-08, pp. 201-04.
- ⁶⁵ Acts of Ark., 1903, pp. 178-79.
- ⁶⁶ Acts of Va., 1901, extra sess., pp. 212-13; 1901-02, pp. 639-40.
- ⁶⁷ Acts of Tenn., 1903, p. 75.
- ⁶⁸ Laws of S. C., 1905, p. 954.
- ⁶⁹ Raleigh, N. C., *News and Observer*, Nov. 23, 1906.
- ⁷⁰ *Walden v. Vicksburg Ry. and Light Co.*, 1906, 40 S. 751.
- ⁷¹ *State v. Patterson*, 1905, 39 S. 398, at p. 400.
- ⁷² Pub. Laws of N. C., 1909, p. 1256.

CHAPTER X

NEGRO IN COURT ROOM

THE Negro goes into a court room in one or more of six capacities, namely: as spectator, witness, juror, party to a suit, attorney, or judge. It is in each of these capacities that the Negro in the court room is to be considered, but some of them permit of only brief mention. How the Negro actually fares in the court room—whether he gets justice as often as the white person does, whether his testimony has as much weight with the jury and court as that of the white witness, whether the Negro attorney or judge is accorded as much courtesy as the white man in a similar position—would make an interesting and profitable study, but such a study is largely outside the field of this investigation. It should be kept in mind now, as in the previous chapters, that only those distinctions are considered which have come within the pale of the law since 1865, either in the form of statutory enactment or judicial decision. Where mention is made of some of the actual extralegal race distinctions in the court room, it is only for illustration.

AS SPECTATOR

The court room, while the court is in session, is open to all citizens, regardless of race or color. No instance has

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been found either in the statutes or judicial reports of one's admission to or exclusion from the court room being dependent upon his race or color. It is to be noticed, however, in Southern court rooms that the spectators are separated by race, Negroes usually occupying seats on one side of the room and white people on the other. This must be entirely a matter of custom, as no case has been found of such separation being required by law or ordinance. While this point has not been deemed important enough for a special investigation, it is presumed that one will find the races separated in the court room in those States or communities where they are separated in other places—as in public conveyances, schools, and churches.

A Negro in the South, as elsewhere, has, legally and actually, as good an opportunity to observe court proceedings as a white person, though custom may require him to sit in a different part of the court room from that occupied by the latter.

AS JUDGE

Little within the scope of this chapter can be said of the Negro as a judge. There are cases still in the North of Negroes sitting on the bench, mostly in lower courts, and there may be instances, here and there, in the South, of Negroes holding judicial offices. Certainly, the Negro elector is eligible, both under Federal and State Constitutions, to hold a judgeship. Whether or not there are Negroes on the bench in a given State is not determined by the legislatures or the courts, but by the appointing power or by the choice of the people at the polls.

AS LAWYER

A Negro is eligible to practice law in every State; that is, nothing to the contrary appears in any of the State or Federal statutes now in force. Negroes may be admitted to the bar everywhere upon proving the same qualifications and passing the same examinations as required of other applicants for license. But this has not always been so. The privilege of practicing law in Iowa,¹ for instance, was, until 1870, restricted to white males. In that year it was extended to women and to members of other races than the white. Only one State appears to have considered it needful to guarantee by statutory enactment the right to practice law to the Negro. An act of the Colorado² legislature in 1897 reads: "No persons shall be denied the right to practice as aforesaid on account of race or sex."

In 1877, a Negro, with a license to practice law in Massachusetts and the Circuit and District courts of the United States in the city of Baltimore, applied for a license to practice in the State courts of Maryland. The laws of Maryland³ of 1872 limited the privilege of admission to the bar to white male citizens. The Negro brought suit because he was refused admission to the Maryland bar, and the Court of Appeals of Maryland⁴ held that the State had a right to limit the privilege of practicing law to white males, holding that such a limitation did not violate the Fourteenth Amendment. The court said, in part: "The privilege of admission to the office of an attorney cannot be said to be a right or immunity belonging to the citizen, but is governed and regulated by the Legisla-

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ture, which may prescribe the qualifications required and designate the class of persons who may be admitted. The power of regulating the admission of attorneys in the courts of a State is one belonging to the State, and not to the Federal Government. As said by Mr. Justice Bradley in Bradwell's case:⁵ 'In the nature of things it is not every citizen of every age, sex and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason and experience, for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State.'” According to the opinion in this case, which has not been overruled so far as has been found, a State legislature may, in the exercise of its police power, limit the privilege of practicing law to white males or to white people, and thus debar the Negro altogether. In the latest collection of Maryland laws, however, that of 1904, no mention is made of race in the prescribed qualifications for admission to the bar, but no express repeal has been found in the annual statutes of the law of 1872 which limited the privilege of practicing law to white males. The presumption is, however, that Maryland, in common with the other States, now admits Negro applicants on the same terms as white.

It is generally known that Negro lawyers in the Southern States are few, and it is considered that the field there for the Negro lawyer is not promising. There were seven hundred and twenty-eight Negro lawyers in the United States in 1900. The following notice in *The Emmanuel Magazine* of July 3, 1909, a monthly publication by a Negro

AS WITNESS

in Washington, North Carolina, is interesting in this connection: "Mr. E. W. Canady, a respectable colored lawyer of Durham, N. C., not long since received three thousand four hundred dollars for his service at the bar in representing one case. This speaks more for him than anything else possibly could. It shows the public's confidence in his ability both as a lawyer and a gentleman of integrity. It also shows that, at least in some cases, a Negro can get justice in a Southern court, not only for himself, but for others. The profession of law is the most difficult one a colored man can follow in the South, because he must deal with white judges, white jurors, white lawyers, and, sometimes, white witnesses, and a public sentiment which is created by the whites. If he keep his soul well equipoised and act gently and manfully—not bootlicking, but seeking the peace of the city wherein he dwelleth, as Jeremiah advised the Jews of Babylon to do, he can fare equally as well, if not better, in the South as he can in the North. I was not a little surprised when I asked Mr. Canady how the judges treated him and he said, 'Oh, they'll treat you all right, if you act rightly; they are bound to follow the law, you know.' This should encourage more young men to take up this profession."

AS WITNESS

When one comes to the Negro as a witness, he finds much legislation and many judicial decisions, but they are confined largely to the first years after Emancipation; that is, to the years during which the rights and privileges of the Negro as a freeman were being defined and fixed.

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The Negro slave had been either deemed incompetent as a witness, or, if deemed competent, his testimony was admitted only in certain actions.

In 1866, a white man in Kentucky was indicted for entering the house of a Negro and committing larceny. At the time a Negro in that State could not testify against a white man. A Circuit Court⁶ of the United States decided that it could take jurisdiction of this case under the Civil Rights Bill of 1866, holding that the Negro, as a citizen, had the right to be a witness in court. This appears to be the only case in which the Federal court has adjudicated upon the right of a Negro to testify.

A law of Alabama⁷ of 1865 made Negroes competent to testify only in open court and only in cases, civil or criminal, to which a freedman, free Negro, or mulatto, was a party. This was reenacted in 1867.⁸ In 1886, a white man in Mobile was tried for the murder of a Negro. All the witnesses for the prosecution were Negroes, and all for the defendant, white people. The question of the color of witnesses was raised, and the city court of Mobile charged: ". . . it is immaterial whether the witnesses were white or black, if you believe beyond a reasonable doubt that black witnesses are telling the truth, it is as much your duty to convict on their evidence as though they were white." There was an exception to this charge, but the Supreme Court of Alabama⁹ overruled the exception. The present law of Alabama seems to be that the color of the witness is immaterial in determining his competency.

The Supreme Court of Arkansas,¹⁰ in 1869, held that by the Civil Rights Bill of 1866 the laws prohibiting Ne-

groes from testifying became inoperative. No other case on the point seems to have arisen in the State.

The Constitution ¹¹ of Florida of 1865 permitted Negroes to testify only in proceedings founded upon injury to a Negro or in cases affecting the rights and remedies of Negroes. A statute ¹² of the same year, relative to testimony in general, provided that the testimony of Negroes should not be taken by deposition in writing or upon written interrogation, or "otherwise than in such manner as will enable the court or jury to judge the credibility of the witness."

The Constitution ¹³ of Georgia of 1865 made it the duty of the general assembly to provide laws prescribing in what cases the testimony of Negroes should be admitted in the courts. This is the only reference to the Negro as a witness found in the Georgia statutes or court reports.

Kentucky, ¹⁴ in 1865, provided that Negroes and mulattoes should be competent witnesses in all civil proceedings in which Negroes or mulattoes were the only parties interested in the issue, and in all criminal proceedings in which Negroes or mulattoes were the defendants. In 1867, the Court of Appeals of Kentucky ¹⁵ held that the law of Kentucky prohibiting a Negro from testifying against a white person was still in force and was not rendered inoperative by the Civil Rights Bill of 1866.

The Constitution ¹⁶ of Maryland of 1867 provided that no person should be incompetent as a witness on account of race or color unless thereafter so declared by an act of the general assembly. The general assembly appears not to have acted.

Mississippi, ¹⁷ in 1865, provided that freedmen, free

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Negroes, and mulattoes, should be competent in all civil cases to which a freedman, free Negro, or mulatto was a party, and in criminal cases in which the crime charged was alleged to have been committed by a white person upon a freedman, free Negro, or mulatto. But in 1867, Negroes were given the right to testify on the same terms as white people.¹⁸ In 1865, South Carolina¹⁹ declared that Negroes might testify in cases to which a person of color was a party. Tennessee,²⁰ the same year, provided that Negroes and Indians should be competent as witnesses "in as full measure as such persons are by an act of Congress competent witnesses in all the courts of the United States."

The Constitution²¹ of Texas of 1866 contains the following section: "Africans and their descendants shall not be prohibited, on account of their color or race, from testifying orally, as witnesses, in any case, civil or criminal, involving the right of injury to, or crime against, any of them in person or property, under the same rules of evidence that may be applicable to the white race; the credibility of their testimony to be determined by the court or jury hearing the same; and the legislature shall have power to authorize them to testify as witnesses in all other cases, under such regulations that may be prescribed, as to facts hereafter occurring." In pursuance of this authority, the legislature²² enacted that persons of color should not testify except where a prosecution was against a person of color or where the alleged offence was against the person or property of a person of color. But in 1868, the Supreme Court²³ of Texas held that the first section of the Civil Rights Bill gave Negroes the right to testify,

and in 1871 the legislature ²⁴ said that in the courts of that State there shall be no exclusion of any witness on account of color.

Virginia,²⁵ in 1866, provided that Negroes and Indians should be competent to testify in cases in which a Negro or Indian was a party. The testimony of Negroes had to be "*ore tenus*, and not by deposition." The next year, this law was repealed and a statute ²⁶ enacted that colored persons should be competent to testify "as if they were white."

Thus far the legislation on Negro testimony in the Southern States only has been given. Similar questions have arisen in some of the other States. Thus, by an early statute of California ²⁷ "no Indian, or person having one-half or more Indian blood, or Mongolian, or Chinese," was permitted to give evidence in favor of or against a white person. The Supreme Court ²⁸ of the State held in 1869 that this statute violated the Civil Rights Bill and was therefore null and void. A minority of the court, however, dissented on the ground that the Civil Rights Bill itself was unconstitutional as interfering with the domestic relations of citizens.

A law of Indiana ²⁹ of 1865 provided that all persons of competent age, without distinction as to color or blood, should be competent as witnesses, but provided that no Negro or mulatto who had come, or who should thereafter come into this State in violation of the thirteenth article of the Constitution of the State (prohibiting the immigration of free Negroes) should, while said article continued in force, be competent as a witness in any case in which a white person was a party in interest. It also provided ³⁰

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that where a Negro, Indian, or person excluded on account of mixed blood was a party in the case, his opponent should be excluded. Nevada,³¹ the same year, gave Negroes the right to testify, but not in favor of or against a white person, and also provided that the credibility of such Negro, black, or mulatto person should be left entirely with the jury. Washington,³² in 1866, provided that no one should be incompetent as a witness "by reason of having Negro blood." But in 1869, the legislature³³ said that Indians or persons having over one-half Indian blood should not be competent to testify in an action or proceeding to which a white person was a party. West Virginia³⁴ passed a law in 1866 that no person should be incompetent as a witness on account of race or color.

During the first years after Emancipation, the States were very doubtful of the Negro's fitness as a witness. In saying, as many of them did, that he could be a witness only in cases in which a Negro was a party, they were following the "Black Laws" before the War, to which reference was made in the chapter on "The Black Laws of 1865-68." That they were doubtful of the testimony of the Negro is shown by the provision of the act that the Negro's credibility should be the subject of a special charge by the court and that his testimony should be given orally. It has been seen that some of the States soon repealed their laws discriminating against the Negro as a witness, and that others enacted statutes allowing him to testify upon the same terms and conditions as a white person. In some of the States, the records do not show that the right to testify in court has yet been given to the Negro. But it must be taken as settled that, even in those

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States which are silent on the subject, the Negro does have the same right to testify as the white person. How much weight is actually given to his testimony is a matter not of law, but of fact, to be determined by the trier of fact, or jury, as the case may be. It may be said, in short, that, at present, the right of the Negro to testify in court is precisely co-extensive with the right of the white person.

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Most of the legislation and suits concerning the Negro as a witness came during the years between 1865 and 1870. Since then, the right of the Negro to testify in court has been generally undisputed. With the Negro as a juror, it has been different. There has not been a great deal of legislation about the Negro as a juror, not even during the years 1865-70 which were so prolific of race legislation. But the court reports from 1865 have been abundantly supplied with cases that have to do with the Negro as a juror, not referring so much to his right to serve as to his actual service on the jury. First, reference will be made to the legislation on the topic, then a number of cases will be discussed, most of which have turned upon a few fundamental principles of constitutional law, and, finally, a word will be said of Negro jury service as it actually exists.

The fourth section of the Civil Rights Bill ³⁵ of 1875 reads: "That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, or account of race, color,

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or previous condition of servitude, and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, upon conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." As was seen in the previous chapter on the civil rights of Negroes, the first sections of the Civil Rights Bill were declared unconstitutional in 1883. But, as will be seen in the discussion of the cases that have arisen about the Negro as a juror, the section quoted above has stood the test of constitutionality and is still a part of our Federal statute law.

When the States outside the South saw, in 1883, that the Federal Government was impotent to secure civil rights to Negroes, they began to enact Civil Rights Bills of their own, which virtually copied the Federal statutes of 1875. The following States enacted statutes practically the same as the Federal law referring to jury service: Indiana,³⁶ in 1885; Michigan,³⁷ in 1885; New York,³⁸ in 1895; Ohio,³⁹ in 1884, and Rhode Island,⁴⁰ in 1885. The only difference between these State statutes and the Federal statute is in the punishment for keeping a person off the jury because of his race or color. Indiana and Michigan impose a fine of not less than one hundred dollars or imprisonment of not more than thirty days, or both; New York imposes a fine of from one hundred dollars to five hundred dollars or imprisonment from thirty to ninety days, or both; Ohio imposes a fine from fifty dollars to five hundred dollars or imprisonment between thirty and ninety days, or both; Rhode Island imposes a fine not to exceed one hundred dollars. This is practically all of

the jury legislation outside the South, which has been found.

In Arkansas,⁴¹ in 1867, a law granting certain rights to Negroes had the following provision: "That nothing herein contained shall be construed to repeal or modify any statute or common law usage of this State respecting . . . service on juries." Though nothing is said of it, one may infer that this meant that Negroes were not to sit on juries. A Louisiana⁴² law of 1880 states that, in the selection of jurors, "there shall be no distinction made on account of race, color, or previous condition." This State at the time was in the hands of the Reconstructionists. Mississippi,⁴³ in 1867, provided that freedmen should not be competent to serve as petit or grand jurors. A law of Tennessee⁴⁴ of 1866, giving Negroes the right to testify, had the provision that it should not be construed to give colored persons the right to sit on juries in that State. The same year, a law⁴⁵ repealing certain other acts had the provision that nothing in the act should be construed to admit persons of color to serve on the jury. But in 1868, the Negroes of Tennessee⁴⁶ were given full rights in this respect. This appears to be all of the legislation as to Negro jurors in the South between 1865 and the present.

That the statute of 1875 prohibiting the exclusion of persons from jury service on account of race, color, or previous condition of servitude is constitutional, has been decided in a series of cases before the Supreme Court of the United States.⁴⁷ The mere fact that no Negroes are on a certain jury does not indicate that the Fourteenth Amendment, under which all these jury cases arise, has been violated; it must be shown that the Negroes were

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kept off the jury consciously by State officials because of their race, color, or previous condition.⁴⁸ The Fourteenth Amendment is violated, however, when the officers of the State keep Negroes off the juries for these causes. The Supreme Court⁴⁹ of the United States said in 1899: "Whenever by an action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him contrary to the Fourteenth Amendment to the Constitution of the United States."

A custom seems to have grown up among some lawyers, particularly in the South, to move to quash the indictment whenever a Negro is on trial for a crime and there are no Negroes on the grand jury. With almost absolute uniformity, the State courts have held that there is no ground for quashing the indictment unless it is shown that Negroes were kept off the juries purposely and because of their race or color.⁵⁰ The cases show also that, if a Negro is kept off the grand jury because of his race, there is ground for quashing the indictment. Texas has furnished far more of these jury cases than any other Southern State. Wherever the jury commissioners have betrayed in any way the fact that they kept Negroes off the juries because of their race, the indictment has been quashed. A few instances will suffice. In one case the commissioners said that they did not put Negroes on the jury because they considered them unfit; this was held⁵¹ to be in violation of the Fourteenth Amendment. When, again, they said

that they kept Negroes off the juries because their presence "would be offensive to the white jurors," the indictment was quashed.⁵² In a county of 11,000 voters in Texas, about 1,000 of them were Negroes, of whom 600 or 700 were competent to be jurors. No Negro had ever been on a jury there. The commissioners admitted that they would not put a Negro on if they knew it. The indictment was quashed.⁵³ In another case,⁵⁴ they said they would not put Negroes on juries because it would create a conflict between the races which would injure the Negroes. This was held a sufficient admission to quash the indictment. In a case arising as late as 1903, the commissioners undertook to satisfy the Fourteenth Amendment by putting on a Negro. They put on a Negro who had either moved out of the county or was dead. This was held to be enough of a race discrimination to quash the indictment.⁵⁵

No matter how large a percentage of the population is colored, if it is not proved that Negroes were kept off the jury because of race or color, there is no ground for objection. Thus, it was found that a Negro had never been known to sit on a grand jury in Bexar County, Texas, where there were 7,000 or 8,000 possible jurors, of whom 600 or 700 were colored. It was not proved, however, that they were kept off on account of race or color, and it was held that there was no ground for quashing an indictment.⁵⁶

The following interesting case arose in Utah in 1900: A white person refused to serve on a jury with a Negro, and wrote a note making a complaint. The Negro was thereupon excluded from the jury. Later, the Negro

brought an action against the white man to recover damages to the extent of the jury fees. The court held ⁵⁷ that, while color was not a test of one's fitness to be a juror, a written objection to serve on a jury with a Negro is no ground for an action for damages by a colored man.

The latest case of race distinction in juries comes from Oklahoma. There were four Negroes on a jury, and for that reason the judge discharged the jury. He said that the State had separate cars, separate schools, and separate tables for Negroes and whites, and "he would not insult white men by making them serve on a jury with Negroes." The case is so recent as to be reported, as yet, only in the newspapers.⁵⁸

The constitutional right of the Negro to serve on a jury or to be tried before a jury composed, in whole or in part, of Negroes, is well expressed in a recent Texas case ⁵⁹ as follows: "It is not a question as to the right of a Negro, or any number of Negroes, to sit on a grand jury, that the Fourteenth Amendment to the Constitution of the United State was intended to provide for; but it was intended, where a Negro was on trial, to prevent discrimination against the Negro race in the formation of the grand jury, which presented the indictment, and only in case Negroes are intentionally excluded from the grand jury is he denied the equal protection of the laws. It was never intended by the Fourteenth Amendment to guaranty a Negro defendant a full Negro grand jury, or to guaranty to him any particular number of grand jurors, but it was intended to prevent intentional exclusion from the grand jury."

Actual Jury Service by Negroes in South

In treating the Negro as a juror, the writer departed from the habit of confining his discussion to the race distinctions manifested in statutes and judicial reports. As he went through the statutes and reports, these questions arose in his mind: Do Negroes actually serve on the juries in those communities where they are numerous? If so, what satisfaction have they given? In order to obtain answers to these questions, he sent out letters to the clerks of court in every county in the Southern States in which Negroes constituted one-half or more of the population in 1900. Over three hundred letters were sent out containing the following inquiry: "I wish to know to what extent Negroes actually serve on juries, how Negro jurors are regarded by the court and the people at large, whether the number of colored jurors has increased or decreased in late years, what has been the experience of your county as to the satisfaction of colored jurors?" Of course, as many replies were not received; but the replies that were received indicate the extent of Negro jury service in the Southern States. These replies will be quoted from freely in each case, the State and the number of Negroes and white people in the particular county will be given, but not the name of the county.

Alabama.—County No. 1, 10,000 white people, 13,000 Negroes: "Negroes are not allowed to sit upon juries in this county. It sometimes happens that names of Negroes are placed in our jury-box by mistake on the part of the jury commissioners, and are regularly drawn to serve as jurors; this, however, is a very rare occurrence. Once in

the past four years, a Negro was drawn as a grand juror (by mistake) who appeared and insisted upon the court's impaneling him with other jurors, which was done in accordance with law, the court having no legal right to discharge or excuse him. My recollection is he served two days, when he was taken out at night and severely beaten, and was then discharged on his own petition by the court. This will convey to your mind that Negro jurors are not very wholesomely regarded and tolerated in this county. The fact is, Negroes have never been or never will be allowed to sit on juries in this county."

County No. 2, 5,000 white people, 21,000 Negroes: "I have lived in this county for more than sixty-six years, and we have never had a Negro juror in that time, nor do I ever expect to see one in the jury-box in this county. Our adjoining counties have all had them, a number of years ago."

County No. 3, 5,000 white people, 27,000 Negroes: "Negroes do not serve on juries in our courts. Such a state of affairs would be considered by the people of this county as farcical. The Lord defend us from having jurors of a race of people who are absolutely without regard for an oath."

Arkansas.—County No. 1, 1,800 white people, 12,600 Negroes: "No Negroes serve in this county on regular juries. Sometimes when hard to obtain white jurors, a few Negroes may be taken in cases in J. P. Courts, but not often. Even this habit is smaller than formerly, falling off every year. Colored jurors [are] not looked upon as intelligent, and very few as honest and possessing integrity, and they, as a rule, are also uneducated."

County No. 2, 14,000 white people, 29,800 Negroes: "No Negroes have served on juries in the court of this county since 1894. Prior to that time it was a common thing for them to be in the majority. I believe the Negroes are fairly well pleased with the verdicts of all white jurors, as the question is nearly always propounded to the juror, when it is a Negro defendant: 'Would you give the defendant the same consideration as if he was a white man?' "

Florida.—County No. 1, 17,000 white people, 22,000 Negroes: "It has been many years since a Negro sat upon a jury in this court, and the probability is, it will be many more. Negroes are not regarded as good jurors, and I believe it to be a fact that a Negro would prefer being tried by a white jury than a mixed jury, or a jury composed wholly of Negroes; this applies to both civil and criminal matters."

County No. 2, 11,000 white people, 12,000 Negroes: "Negroes do not sit on the jury in this county, and have not since the days of 'Carpet-Bag Rule.' I do not think a county in this State permits a Negro jurymen."

County No. 3, 6,000 white people, 8,000 Negroes: "Negro jurymen or other officers are a thing of the past in our county and State. The oldest person can hardly recall the time when we had such in our county, with the exception of a very few years just after the war."

County No. 4, 9,000 white people, 15,000 Negroes: ". . . in the circuit court of the State it is very seldom that a Negro serves on the jury. Negroes, as a rule, are not good jurors, for the reason that they are usually very ignorant and can be easily influenced by others in the

rendering of their verdict. The Negro jurors, so far as the State courts are concerned, are almost eliminated. In the Federal courts of the State, a large number of Negroes serve on the juries. . . ."

County No. 5, 2,300 white people, 2,700 Negroes: "The laws of this State require that the county commissioners select not less than 290 nor more than 310 'persons of approved integrity, fair character, sound judgment and intelligence' to serve as jurors. Therefore, because most of the elder Negroes are illiterate and because most of the younger ones that remain here are of other than fair character, there are but few Negroes, about one per cent., whose names are drawn or selected to go into the jury-box. If one is drawn as juror . . . he serves as such juror, and no one has ever objected to one so far as I know of. My experience covers a period of ten years, during which time . . . we have had only two Negroes drawn as jurors. No person has ever appealed a case on account of not having a Negro on the jury, nor has there been anything said outside on account of the practical elimination of the Negro from jury duty."

Georgia.—County No. 1, 5,000 white people, 24,000 Negroes: "No Negroes serve on our jury. There are no Negro names in the jury-box."

County No. 2, 5,900 white people, 6,800 Negroes: "No Negroes have ever been placed in the jury-box in this county. They are not regarded as competent or reliable as jurors, hence they have not [been] tried as such in this county."

County No. 3, 5,000 white people, 12,000 Negroes: "Negroes do not serve as jurors in this county, for several

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reasons to wit: Incompetency, strong prejudices, superstitiousness, and general unfitness in regard to equity. . . . It happens frequently they are drawn and serve on juries in what we term here United States courts. . . .”

County No. 4, 1,500 white people, 8,800 Negroes: “Negroes do not serve on the juries in this county. . . . None of the Negroes in this county have ever been placed in such [jury] boxes.”

County No. 5, 4,000 white people, 9,000 Negroes: “We do not have Negroes as jurors; we tried them and found them incompetent and otherwise disqualified.”

County No. 6, 7,000 white people, 11,000 Negroes: “No Negroes serve on the jury in this county.”

County No. 7, 4,800 white people, 5,000 Negroes: “Not a blooming one [Negro juror], and not likely to be.”

County No. 8, 2,000 white people, 5,800 Negroes: “There are no Negro jurors in this county.”

County No. 9, 6,000 white people, 7,000 Negroes: “I have lived here all my life and do not know that there has been any Negro who has served on the jury in this county. I am quite sure there has been none for the past 20 or 30 years.”

County No. 10, 2,500 white people, 4,000 Negroes: “. . . There has never been a Negro juror to serve in this country nor any other county surrounding this to my knowledge. We revise our jury-boxes biennially, and never have yet put a Negro’s name on the list of jurors. And I think this is the practice all over the State. I am satisfied if one should be put on any jury that the white men on would flatly refuse to serve at all. . . .”

County No. 11, 5,000 white people, 6,000 Negroes:

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“ . . . There is no record of Negroes ever serving as jurors in this county.”

Kentucky.—No replies have come from the seven counties of Kentucky in which Negroes constitute a large percentage of the population. But the following is quoted from a letter from the Assistant Attorney General of the State: “Negro jurors are sometimes selected in various parts of the State, and I presume all over the State. Twenty years ago the custom was more prevalent than at present of putting Negroes on the juries. They were the best class of Negroes, and I am reliably informed that in various parts of the State the Negroes themselves requested to be left off the juries, which may account for the fact that the practice seems to have fallen into disuse.”

Louisiana.—Parish No. 1, 3,900 white people, 12,700 Negroes: “. . . we now have no Negroes to serve on the jury here at all. Some years ago we had Negro jurors, but they proved so unsatisfactory that they were gradually dropped out and for several years [we] have had no Negroes at all.”

Parish No. 2, 8,800 white people, 11,300 Negroes: “. . . Negroes serve as jurors in this parish to a limited extent. The jury commissioners, when they know of an exceptionally good, honest, sober and industrious Negro, have no objections to placing his name in the jury-box. It is true, however, that the number is very limited, owing to the fact that very few Negroes will come to the standard as far as the above qualifications are concerned. Out of the 300 names in the jury-box from which we draw our juries, there are about a dozen Negroes. The Negroes

as jurors do not give any trouble; they always follow the suggestions and advice of the white jurors."

Parish No. 3, 11,000 white people, 17,800 Negroes: ". . . in this parish Negroes have served on both our grand and petit juries ever since the Civil War. Only the very best of our Negroes are drawn on the jury; they usually constitute about one-half of the panel on the petit jury and on the grand jury they are always represented, but in a much smaller proportion. The number of Negroes with us fit for jury service is not increasing as one would think would be the case considering their advantage for an education. They render very good service, rather prone to convict in serious personal injury cases, inflict capital punishment more readily than white juries and generally want all law enforced, especially against bad men of their own race, as they know this is their best protection."

Parish No. 4, 2,000 white people, 13,700 Negroes: ". . . we have had one Negro on the petit jury the last criminal term of court in a murder case of another Negro. He is the only Negro that has sat on the jury for two or three years in our parish. We do not allow any Negroes to sit on the grand jury in our parish. There are three names of Negroes in the jury-box that we draw our general venire from, as well as I remember, possibly one or two more, but not more than that number, as well as I remember. We used to have as many Negroes as white jurors here ten or twelve years ago."

Mississippi.—County No. 1, 4,000 white people, 31,000 Negroes: ". . . Negroes do serve on juries in our circuit courts, also in our magistrate's court. As to the extent Negro jurors serve Negro jurors are decreasing in

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late years. It requires certain qualifications to make them competent under the Constitution of the State of Mississippi, to-wit: Every male inhabitant of the State, except idiots, insane persons, and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who resided in the State two years, and one year in the election district, or in the incorporated city or town in which he offers to vote, and who is duly registered, and has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy, and who has paid, on or before the first day of February of the year in which he shall offer to vote, all taxes which have been legally required of him, and is able to read any section of the Constitution of the State, or is able to understand the same, when read to him, is a qualified voter, and can be a member of either our grand jury or a petit jury if drawn as such. Our Negro jurors are either ministers or school teachers, with some farmers. The majority of them fail to pay their taxes, which disqualifies them from jury service. Negro jurors are not regarded by our courts as good jurymen, but we are compelled to use them when drawn and they are qualified to serve."

County No. 2, 8,000 white people, 11,700 Negroes: ". . . Negroes sitting on jury and paying poll-tax is a thing of the past in my county. Only about 25 or 30 [are] registered. Disfranchised on educational qualification."

County No. 3, 3,000 white people, 23,000 Negroes: "In my judicial district there are five counties, in three of which Negroes serve upon the juries in about the propor-

tion that they are qualified under the law. The qualifications for jurors are very strict in this State and comparatively few Negroes can qualify legally. In limited numbers they make very satisfactory jurors when the rights of their people are involved. As a rule, a Negro does not like to try a white man's case; they are much more inclined to convict Negroes charged with crime than are the white jurors, and Negro defendants always challenge Negro jurors. In the 'Black Belt' of Mississippi, a Negro can always receive a fair trial in the courts, but this is not so certain in the white counties. In the two counties where Negroes do not serve upon the juries, there are practically no Negroes qualified under the law, because none are registered voters."

County No. 4, 6,000 white people, 18,000 Negroes: "We don't have any Negro jurors at all in this county. We have very few registered Negroes in the county."

County No. 5, 7,000 white people, 7,000 Negroes: ". . . Negroes do sit on juries in this county at times. They have a right to serve as jurors when they have duly registered and paid their tax and some other qualifications. . . . But the Board of Supervisors draws the names of 200 or more persons on the first Monday of January in each year and puts them in a box, so many for each supervisor's district. But of late years the supervisors have not put many names of Negroes in the jury-box; therefore, we have not had very [many] Negro jurors. But we have one or two Negro jurors nearly every term of our court [circuit court]. . . ."

County No. 6, 8,000 white people, 28,700 Negroes: "The jury law in this State makes no discrimination on

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account of race, color, or previous condition of servitude, and no man is excluded from the jury on account of his color. . . . In some of the counties of the State, the boards of supervisors select some Negroes for jury service, but the great trouble is, there are comparatively few Negroes in any county, and none in some of the counties, who can measure up to the qualifications prescribed by law. . . . The criminal element in Mississippi is composed largely of the Negro race, and as a matter of fact, the persons of that race charged with crime and the lawyers who defend them, the large majority of whom are of the white race, do not want Negroes on the jury, and Negroes are almost invariably challenged. If Negroes chance to be summoned on a special venire in a capital case with white men, they [the Negroes] disqualify to avoid service, sometimes by claiming that they are not registered voters, but generally by claiming that they are opposed to the death penalty.

“The following incident happened in one of our courts and may help to shed some light on the subject-matter wanted: A Negro was indicted for manslaughter. He was too poor to employ counsel to conduct his case, and it not being a capital case, the court could not appoint counsel for him, and told him so. He said he would do the best he could without a lawyer, and the court told him of his rights under the law, that he could look over the jury, and of his right to challenge four of them if he was dissatisfied with the panel as it stood. There were four Negroes on the jury, and he very promptly advised the court that he was not satisfied; the court told him he had a right to object to four of them, and he very quickly told the court,

'Ef dat is so, dem niggers can stand aside.' They were excused by the court, and the sheriff was ordered to complete the panel from the very best citizens to be had, which was done, the jury being, when complete, all white men. The defendant addressed the jury in his own defence and was acquitted.

"In my county . . . we have had no Negroes on the jury for the past 15 years or more. We have some 30,000 colored population in this county, . . . and we have only about 175 registered in the county. The board of supervisors, as a rule, does not place their names in the box, for the reason that, as above stated, they will not serve if any way out of it can be found."

County No. 7, 1,000 white people, 4,000 Negroes: ". . . we have no Negro jurors in this county at all."

County No. 8, 8,000 white people, 12,000 Negroes: "There are only 400 white qualified electors in this county, only about 30 qualified Negro electors. We never have a term of court without having several Negroes on it, besides we always have Negroes on the trial juries. It is not often that they sit on a case unless a Negro lawyer has one side of it. They do not believe in convicting one of their color. They are objectionable in every sense of the word. They are not regarded by the other members of the jury. Negro jurors are on the increase in recent years. . . ."

County No. 9, 4,000 white people, 12,000 Negroes: "No Negroes have served on jury in this county since Republican party."

Missouri.—County No. 1, 24,000 white people, 4,500 Negroes: ". . . As far as I am informed, and certainly

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since I have been connected with the court here, no Negroes have served as jurors either in our court or in any justice of the peace court in this county. While probably under our laws Negroes would be legal jurors, the county court of this county will not draw them as jurors, and the Sheriff, when he has to get jurors, will not summon them. And I do not believe our lawyers here would permit a Negro to remain on a jury before which they would have to try a case. Further, I am sure that no white man here would serve on a jury with a Negro, even though his refusal to so serve would subject him to a jail sentence. . . .”

County No. 2, 21,000 white people, 4,000 Negroes: “. . . we have never known of a Negro juror in . . . county.”

County No. 3, 28,000 white people, 4,700 Negroes: “Negroes never have this burden heaped upon them in this State.”

County No. 4, 540,000 white people, 35,500 Negroes: “We do not have many Negro jurors. I have occupied this post but six months, and in that time we have had but two Negroes called for service. Our jury canvass is made biennially. All names placed in the wheel are taken just as drawn from the same on orders from the various divisions of court. A few of the more intelligent Negroes are placed on the jury list. I made inquiry when two Negroes served on a jury last week. The other jurors did not seem to feel any antipathy. Of course, a little surprise was manifested at seeing them in court when their names were called. Neither the attorneys for the plaintiff nor [for] the defence challenged them but accepted them on the

jury. My predecessors never placed many of the Negroes' names in the wheel as I understand from them." This letter was from the jury commissioner, not the clerk of the court.

North Carolina.—County No. 1, 6,800 white people, 8,000 Negroes: “. . . of late years very few Negroes serve on the juries in this county for the reasons that they are an illiterate race and moral character not what it should be. Further, he is easily influenced, deciding with a juror whom he may like instead of weighing the evidence and deciding accordingly. The number of Negro jurors has decreased for the past few years on account of the Negro of to-day [being] morally not as good as the Negro of several years ago.”

County No. 2, 11,000 white people, 19,000 Negroes: “I will say that Negroes do not serve on the jury in this county and have not since we, the white people, got the government in our hands. When the Republican party was in power Negroes were drawn, both regular and talis jurors, and not one out of one hundred was a competent juror, but, strange to say, when a Negro was on trial, he would always prefer the white men to try his case.”

County No. 3, 5,800 white people, 8,300 Negroes: “Negroes occasionally serve on juries in . . . county, but not to as great extent as they did before the passage of the Amendment [the suffrage amendment in 1900]. The County Commissioners have been more particular about the names that are left in the box from which jurors are drawn. Only the best, most reliable and most intelligent Negroes are left in the box. Sometimes it happens that a few are called as talismen, but not then until the

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sheriff has exhausted his best efforts to get white men. Those called are very apt to be good, reliable men, and with a majority of white men in the jury-box are not disposed or able to do wrong. My experience as clerk for 20 years is that they make good jurors, and are apt to be disposed, in criminal actions, to execute the law even against their own race. Judge . . . says that white men on the jury are everywhere disposed to lean toward a Negro litigant, especially if the Negro is of the old-class, before-the-war Negro gentleman and the white man is of these later days 'common trash.' I am told by the judges that in some counties the sheriffs would not dare to call a Negro as a talisman even, but, as I have said, we have them not very frequently and without complaint. I notice that the opposing lawyers are slow in challenging them when so called. . . ."

County No. 4, 12,600 white people, 13,100 Negroes: ". . . Negroes do not serve on juries in our County, nor are they allowed to vote or take any part in county or municipal affairs. . . ."

County No. 5, 5,700 white people, 6,700 Negroes: "A colored man has never served on the jury in this county, neither has a colored man ever voted in this county."

County No. 6, 6,000 white people, 13,000 Negroes: ". . . We still have some Negro jurors at every term of our courts, but not near so many as in former years. Our County Commissioners . . . are very careful in putting the names of only good, respectable Negroes in the jury box. The consequence is we have very few Negroes on our juries, but those we have are well disposed and the most intelligent Negroes of the county, and make very

acceptable jurors. I have been struck with the fact that our lawyers in selecting the jury for both criminal and civil cases, seldom ever object to the Negroes who are on the regular panel. If this is always kept up, with only the best and most intelligent Negroes in the county in the jury-box, all will be well and our people will not object. But in former years, when sometimes the majority of the jury would be Negroes, there was great dissatisfaction."

Oklahoma.—County No. 1, 15,000 white people, 2,400 Negroes: "Negroes have served on both grand and petit juries nearly every term of court with the exception of the last two terms of the district court. There are some Negro names in the box, but they did not happen to be drawn by the Sheriff or myself. The men who have sat have given satisfaction to the litigants, but have been objectionable to the other jurors. Where it has come to a locked-up jury, and where they have to eat and be closely confined with the white man, I have heard some complaint. The court and officials who are all white Republicans—except the sheriff—treat Negroes with utmost fairness."

South Carolina.—County No. 1, 9,000 white people, 19,000 Negroes: ". . . I have only been in office for [the] last four years, but since I have been in office I have had a good many Negroes on juries. Year before last I had Negroes on juries three consecutive courts, and every year I have several of them. We always put the names of those qualified to act in our jury-box, but it is a bad condition of affairs when you go over the Negroes of the county, and find how few are qualified to act. The Negro jurors have increased in our section."

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County No. 2, 5,000 white people, 17,000 Negroes: ". . . The number of Negro jurors has decreased in late years. I do not think that a great number of Negro jurors would impress very favorably the court and the people at large."

County No. 3, 10,000 white people, 19,000 Negroes: ". . . I do not remember ever to have seen a Negro on the jury in this county. I am told, however, that one served occasionally for only awhile after 1876."

County No. 4, 18,000 white people, 41,000 Negroes: "In my experience covering ten years or more, I find it difficult to get a large array of competent jurors. We are careful and painstaking in making our lists; therefore, we never allow a Negro to serve for the reason of the general moral unfitness, and general depravity."

County No. 6, 20,000 white people, 22,000 Negroes: "No Negroes serve on the jury in the county courts in this county."

Tennessee.—No information about Negro jury service in Tennessee has been obtainable.

Texas.—County No. 1, 6,300 white people, 7,800 Negroes: ". . . As to Negro jurors . . . as a rule, in the County Court about one-tenth are Negroes, and they are rarely ever discriminated against. I do not recall a case where they have been rejected on account of race or color by white men. As a rule, they are not so acceptable to Negro litigants as they are to those of the other races. There are a larger per cent. of Negroes in the district court, and there is rarely any criticism. In fact, no prejudice exists here against them as jurors, largely from the fact that only our best Negro citizens are drawn on the

juries. . . . I think the per cent. of Negro jurors has increased. They are simply accepted or struck off as any other citizen. I believe more are accepted by white than colored litigants. They have served on some of our very important cases. . . .”

County No. 2, 14,000 white people, 9,000 Negroes: “We haven’t had any Negroes on the jury in . . . county for several years. They used to have a few on the jury several years ago, so I have been informed, but none in the last few years.”

County No. 3, 21,000 white people, 16,000 Negroes: “We do not use Negro jurors in our State or county courts at all.”

County No. 4, 7,000 white people, 8,000 Negroes: “. . . It has been the rule of . . . county to have Negroes on the grand and petit juries. They have given satisfaction. The colored jurors are represented by about 25 per cent. of the jurors.”

The cases quoted from in the earlier part of this chapter show even better than these letters the attitude of Texas toward Negro jurors.

Virginia.—County No. 1, 6,700 white people, 8,500 Negroes: “No Negro juror in this court for ten years, and I don’t think that there will ever be. . . .”

County No. 2, 3,900 white people, 5,500 Negroes: “. . . from reconstruction days up to ten or twelve years ago a few Negroes served on the jury of this county. My impression is . . . that they made very little impression in the jury, and they were completely dominated by white men in said bodies, who were, of course, greatly in the majority. At this time no Negro jurors are drawn at all.”

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County No. 3, 3,000 white people, 6,000 Negroes:
“ . . . there are no Negroes on our jury list. On several occasions when we had to make up a jury we have put a few on. The impression is here that it does not do to mix the races even in the jury-box.”

County No. 4, 17,900 white people, 19,200 Negroes:
“ Negroes under our Constitution are not debarred from serving as jurors in Virginia, but owing to the nature and disposition of the Negro to follow and not lead, we seldom place them on trial juries. The number of colored jurors has decreased in the last ten years.”

County No. 5, 3,200 white people, 4,900 Negroes:
“ Negroes have for a number of years been serving on the juries in this county, and, as far as I have been able to learn, have generally given satisfactory service. . . . There is hardly ever a jury drawn without some Negroes being on it. Of course, the judge selects those Negroes who are best qualified for the service. . . . Naturally, the number of Negro jurors is not near so large as that of the whites, for the reason . . . that all jurors are selected with reference to their qualifications.”

County No. 6, 4,000 white people, 4,800 Negroes:
“ . . . we never have any Negroes on juries in my county. Haven't had any for about fifteen years. . . .”

County No. 7, 10,000 white people, 13,000 Negroes:
“ . . . Negroes do not serve on juries in this county, and it has been about twenty years since they did jury service here.”

County No. 8, 2,300 white people, 4,400 Negroes:
“ Since the adoption of the new Constitution for this State . . . Negroes no longer serve as jurors in this coun-

ty. Prior to that time they appeared regularly in our courts, and made good jurors in the civil as well as criminal business. Of course, in selecting them, only the best of their race were chosen. And I can't recall an instance, with an experience of sixteen years as clerk of the courts, that any objection was ever raised against them as jurors."

County No. 9, 5,500 white people, 5,600 Negroes: "We don't have colored men on jury in this county."

County No. 10, 9,000 white people, 13,600 Negroes: "Negroes are not allowed to serve on juries in this county."

County No. 11, 1,100 white people, 3,700 Negroes: "We have not had any Negroes to serve on the jury in this county for twelve or fifteen years, and when they did, they gave very poor satisfaction."

Summary: With such incomplete statistics, conclusions as to the actual service of the Negro as a juror can hardly be more than guesses. Some of the clerks of court say that the number of Negro jurors in their counties is increasing; others, that it is decreasing. Some say that race does not come into the consideration of fitness for jury service; others, that Negroes are not allowed on juries at all. Some say that Negro jurors have given satisfaction; others, that they have been scarcely more than figureheads following the lead of white jurors. Several of the clerks think that Negro litigants are reluctant to have Negro jurors sit on their cases. Some feel that Negro jurors are more prone to convict than white jurors are. It is undoubtedly true that there are not as many Negroes qualified for jury service under the laws of the Southern States as there were twenty-five years ago, say.

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Usually one must be an elector to be qualified for jury service. The great majority of the Negroes have been unable to satisfy the suffrage tests and have been disfranchised. They are, consequently, not electors and not eligible to serve as jurors. Hence, if the selection of jurors is conducted with absolute impartiality, there will be comparatively few Negroes retained.

SEPARATE COURTS

South Carolina appears to be the only State which has ever provided a separate court for the trial of cases in which Negroes have interests at issue. That was called the District Court, provided for by a statute⁶⁰ approved December 19, 1865, which statute was repealed September 21, 1866; so the law was in force less than a year. The seventh section of the act of forty-nine sections is: "The District Court shall have exclusive jurisdiction, subject to appeal, of all civil cases where one or both of the parties are persons of color, and of all criminal cases wherein the accused is a person of color, and also of all cases of misdemeanor affecting the person or property of a person of color, and of all cases of bastardy, and of all cases of vagrancy, not tried before a Magistrate. . . ." The Magistrate was given jurisdiction over small disputes, controversies and complaints that arose in his neighborhood between persons of color, or between persons of color and white persons, and of petty misdemeanors committed by or toward persons of color, between master and servant, between master and apprentice, and between employer and laborer, and civil suits involving not over twenty dollars

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in which a person of color was a party. An indictment of a white person for the homicide of a person of color had to be tried in the regular superior court; and so had all other indictments in which a white person was accused of a capital felony affecting the person or property of a person of color. In these forty-nine sections the jurisdiction of this special court for persons of color is worked out in detail; but inasmuch as the law was in force less than a year and was one of the ephemeral "Black Laws" already considered, there is no need to go into it further. Suffice it to say that in the South at present, as in other sections, the people of all races and colors have their rights adjudicated by the same court.

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Alabama, Florida, and Georgia prescribe a heavier punishment for fornication and adultery between white people and Negroes than between members of the same race. On first consideration this appears to be a case of different punishment. As was said by the Supreme Court of Alabama ⁶¹: "The fact that a different punishment is affixed to the offence of adultery when committed between a Negro and a white person, and when committed between two white persons or two Negroes, does not constitute a discrimination against or in favor of either race. The discrimination is not directed against the person of any particular color or race, but against the offence, the nature of which is determined by the opposite colors of the cohabiting parties. The punishment of each offending party, white and black, is precisely the same." The con-

stitutionality of these statutes as to cohabitation between persons of different races has been upheld by the Supreme Court of the United States.⁶²

The following are instances of race distinction in the matter of offences and punishment. South Carolina,⁶³ in 1865, said that a person of color who committed assault upon a white woman with intent to ravish her, or who had sexual intercourse with a white woman by impersonating her husband, should be guilty of a felony "without benefit of clergy." Florida⁶⁴ made it a capital crime to assault a white female with intent to commit rape or to be accessory thereto. Kentucky⁶⁵ provided that all persons, without distinction of color, would be subject to the same pains and penalties for felonies and misdemeanors, adding: "The laws now in force for the punishment of Negroes and mulattoes for rape on white women are hereby continued in force." This was amended⁶⁶ in 1869, but the offence was still against white women. The race distinction in these statutes lies in the fact that heavy punishment was prescribed for an assault upon a white woman, but no such protection was accorded a Negro woman.

South Carolina made it a felony "with benefit of clergy" for a servant to steal a chattel, money, or valuable security to the value of ten dollars belonging to, or in the possession or power of his master or employer. It was an "aggravated misdemeanor" for a servant to steal such property below the value of five dollars. The servant had no right to sell any farm produce without the written evidence from his master or the District Judge or Magistrate that he had a right to do so. But all such race distinc-

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tions in the matter of punishment passed away, as did the other "Black Laws," in 1866.

There are certain statutes as to crimes which, though they do not mention the Negro in so many words, are thought by many to have peculiar application to him. The vagrancy laws of the Southern States, for instance, have been considered as directed primarily against Negroes. Some of the States made it a crime for one to sell cotton in bags between certain hours of the night. This was probably a result of the habit attributed to the Negro of hiding cotton in the jambs of the fences and woods in the daytime to take to the cross-roads store at night. Missouri,⁶⁷ in 1903, made chicken-stealing a felony punishable by imprisonment for five years, or a fine of two hundred dollars. The next year, Kentucky⁶⁸ passed the following statute: "That if any person shall steal chickens, turkeys, ducks, or other fowls of the value of two dollars, or more, he shall be confined in the penitentiary not less than one nor more than five years. Whether this is an indirect race distinction or not, the writer will not take it upon himself to decide.

Some of the States have enacted statutes to the effect that the punishment for the members of all races shall be the same for the same offence. Delaware⁶⁹ did so in 1867. In Mississippi,⁷⁰ in 1865, Negroes were given the right to procure the arrest of a white person; but, if the arrest were false and malicious, the Negro must pay all the costs, be fined not over fifty dollars, and imprisoned not over twenty days. In 1867, however, a statute said that Negroes must have the same punishment as white people. South Carolina,⁷¹ as has been seen, re-

pealed all laws prescribing different punishment for Negroes.

The following interesting bit of news is taken from an Associated Press report of July 21, 1909: "Mobile, Ala.—The commissioners to-day established a curfew law for Negroes. Commencing to-night, all the blacks must be at home or in bed at 10 P.M. Any of them caught wandering at large will be locked up. This action is due to an epidemic of hold-ups perpetrated by Negroes."

A recent instance of race distinction in the court room seems to come from New York. A Pullman porter, named Griffin, was arrested in Montreal, charged with stealing a pocket-book, but the charge was not substantiated and he was released. He thereupon brought suit against Daniel F. Brady, who caused his arrest, and obtained a verdict for two thousand five hundred dollars in damages. The Supreme Court of New York reduced the damages from two thousand five hundred dollars to three hundred dollars. Upon an appeal by Griffin, the appellate division of the Supreme Court sustained the order reducing the damages. The following is a part of the opinion of Judge Drugo of the Supreme Court ⁷² whose order was sustained: "You cannot say that he [Griffin] is just the same as a white man, when you come to say how much his name will suffer. He might suffer more. But, after all, what are the probabilities about it? Is it likely that when a colored man is arrested and imprisoned he feels just as much shame as a white man of any circumstance might?

"I think if you were to take the Mayor of the city and arrest him he would feel very much more humiliated than

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this porter, from the fact that he was the Mayor and not a colored man, for if a colored man he might not feel quite as much humiliation and shame.

“In one sense a colored man is just as good as a white man, for the law says he is, but he has not the same amount of injury under all circumstances that a white man would have. Maybe in a colored community down South, where white men were held in great disfavor, he might be more injured, but after all that is not this sort of a community. In this sort of a community, I dare say the amount of evil that would flow to the colored man would not be as great as it probably would be to a white man.”

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¹ Laws of Ia., 1870, p. 21.

² Laws of Colo., 1897, p. 115.

³ Laws of Md., 1872, p. 134, p. 134; 1876, p. 469.

⁴ *In re Taylor*, 1877, 48 Md. 28, at p. 33.

⁵ *Bradwell v. State*, 1872, 16 Wall. 130 at p. 142.

⁶ *U. S. v. Rhodes*, 1866, Fed. Case No. 16,151.

⁷ Laws of Ala., 1865-66, p. 98.

⁸ *Ibid.*, 1866-67, p. 435.

⁹ *Dolan v. State*, 1886, 81 Ala. 11, at p. 17.

¹⁰ *Kelly v. State*, 1869, 25 Ark. 392.

¹¹ Art. XIV, sec. 2.

¹² Laws of Fla., 1865, pp. 35-36.

¹³ Art. II, sec. 5, par. 4.

¹⁴ Laws of Ky., 1865-66, pp. 38-39.

¹⁵ *Bowlin v. Com.*, 1867, 2 Bush (Ky.) 5.

¹⁶ Art. III, sec. 53.

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- ¹⁷ Laws of Miss., 1865, p. 83.
- ¹⁸ *Ibid.*, 1866-67, pp. 232-33.
- ¹⁹ Laws of S. C., 1865, p. 286.
- ²⁰ Laws of Tenn., 1865-66, p. 24.
- ²¹ Art. VIII, sec. 2.
- ²² Laws of Texas, 1866, p. 59; see Laws of Texas, 1866, pp. 131-32.
- ²³ *Ex parte* Warren, 1868, 31 Texas 143.
- ²⁴ Laws of Texas, 1871, p. 108.
- ²⁵ Laws of Va., 1865-66, pp. 89-90.
- ²⁶ *Ibid.*, 1866-67, p. 860.
- ²⁷ Statutes of Calif., 1863, p. 69.
- ²⁸ *People v. Washington*, 1869, 36 Calif. 658.
- ²⁹ Laws of Ind., 1865, p. 162.
- ³⁰ *Ibid.*, 1865, p. 161.
- ³¹ Laws of Nev., 1864-65, p. 403.
- ³² Laws of Wash., 1866, p. 91.
- ³³ *Ibid.*, 1869, p. 103.
- ³⁴ Laws of W. Va., 1866, p. 85.
- ³⁵ Stat. L., 336, chap. 114, par. 4.
- ³⁶ Burns's Annotated Revisal of 1901, II, sec. 3293.
- ³⁷ Pub. Acts of Mich., 1885, p. 132.
- ³⁸ Laws of N. Y., 1895, I, p. 974.
- ³⁹ Laws of O., 1884, pp. 15-16; 1894, pp. 17-18.
- ⁴⁰ Acts and Resolves of R. I., 1884-85, p. 171.
- ⁴¹ Laws of Ark., 1866-67, p. 99.
- ⁴² Laws of La., 1880, p. 52.
- ⁴³ Laws of Miss., 1866-67, p. 233.
- ⁴⁴ Laws of Tenn., 1865-66, p. 24.
- ⁴⁵ *Ibid.*, p. 65.
- ⁴⁶ *Ibid.*, 1867-68, pp. 32-33.
- ⁴⁷ *Va. v. Rives*, 1879, 100 U. S. 313; *Ex parte Va.*, 1879, 100 U. S. 339; *Strauder v. W. Va.*, 100 U. S. 303; *Carter v.*

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Texas, 1899, 177 U. S. 443; *Rogers v. Ala.*, 1903, 192 U. S. 226.

⁴⁸ *Neal v. Del.*, 1880, 103 U. S. 370; *Bush v. Com. of Ky.*, 1882, 107 U. S. 110; *Ex parte Murray*, 1895, 66 Fed. 297; *Smith v. State*, 1895, 162 U. S. 592; *Binyon v. U. S.* 1903, 76 S. W. 265.

⁴⁹ *Carter v. Texas*, 1899, 177 U. S. 443, at p. 447.

⁵⁰ *Eastling v. Ark.*, 1901, 62 S. W. 584; *Wilson v. Ga.*, 1882, 69 Ga. 224; *Green v. Ala.*, 1882, 73 Ala. 26; *Ky. v. Jackson*, 1880, 78 Ky. 509; *Hicks v. Ky.*, 1881, 3 Ky. Law Rep. 87; *Haggard v. Ky.*, 1881, 79 Ky. 366; *Smith v. Ky.*, 1896, 33 S. W. 825; *La. v. Casey*, 1892, 44 La. Ann. 969; *La. v. Joseph*, 1893, 45 La. Ann. 903; *La. v. Murray*, 1895, 47 La. Ann. 1424; *Cooper v. Md.*, 1885, 64 Md. 40; *Mo. v. Brown*, 1894, 119 Mo. 527; *Bullock v. N. J.*, 1900, 47 At. Rep. 62; *N. C. v. Sloan*, 1887, 97 N. C. 499; *N. C. v. Peoples*, 1902, 131 N. C., 784; *N. C. v. Daniels*, 1904, 46 S. E. 743; *S. C. v. Brownfield*, 1901, 60 S. C. 509; *Williams v. Texas*, 1875, 44 Texas 34; *Cavitt v. Texas*, 1883, 15 Texas Ct. of Ap. Rep. 190; *Carter v. Texas*, 1898, 46 S. W. 236; *Collins v. Texas*, 1900, 60 S. W. 42; *Smith v. Texas*, 1900, 58 S. W. 97; *Parker v. Texas*, 1901, 65 S. W. 1066; *Hubbard v. Texas*, 1902, 67 S. W. 413; *Carter v. Texas*, 1903, 76 S. W. 437; *Fugett v. Texas*, 1903, 77 S. W. 461; *Martin v. Texas*, 1903, 72 S. W. 386.

⁵¹ *Whitney v. Texas*, 1900, 59 S. W. 895.

⁵² *Kipper v. Texas*, 1901, 62 S. W. 420.

⁵³ *Leach v. Texas*, 1901, 62 S. W. 422.

⁵⁴ *Smith v. Texas*, 1902, 69 S. W. 151.

⁵⁵ *Smith v. Texas*, 1903, 77 S. W. 453.

⁵⁶ *Thompson v. Texas*, 1903, 74 S. W. 914.

⁵⁷ *McPherson v. McCarrick*, 1900, 61 P. 1004.

⁵⁸ *Raleigh, N. C., News and Observer*, Feb. 17, 1910.

⁵⁹ *Whiteny v. Texas*, 1901, 63 S. W. 879.

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⁶⁰ Laws of S. C., 1865, pp. 278-91; 1866, pp. 387-90.

⁶¹ Pace and Cox v. State, 1881, 69 Ala. 231.

⁶² Pace v. Ala., 1882, 106 U. S. 583. See also Ellis v. Ala., 1868, 42 Ala., 525; Lord v. Ala., 1875, 53 Ala. 150.

⁶³ Laws of S. C., 1865, p. 271.

⁶⁴ Laws of Fla., 1865, p. 24.

⁶⁵ Laws of Ky., 1865-66, p. 42.

⁶⁶ *Ibid.*, 1869, p. 52.

⁶⁷ Laws of Mo., 1903, p. 161.

⁶⁸ Laws of Ky., 1904, p. 83.

⁶⁹ Laws of Del., 1866-69, p. 161.

⁷⁰ Laws of Miss., 1866-67, pp. 232-33.

⁷¹ Laws of S. C., 1866, p. 405.

⁷² Boston *Post*, May 22, 1909. The volume of New York reports containing this case is not yet accessible. It is referred to, however, in 117 N. Y. Sup., p. 116.

CHAPTER XI

SUFFRAGE

THE Fifteenth Amendment to the Constitution of the United States, ratified on March 30, 1870, reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." In the face of this unequivocal constitutional provision, it would seem impossible to have a legal race distinction in the matter of suffrage. It is plain that, if a State or the United States makes a law that in any way denies or abridges the right of a citizen to vote on account of his race, such an enactment is in violation of the Amendment. The only State or Federal statute or State constitutional provision involving a race distinction that would be valid under the Fifteenth Amendment would be one that did not amount to a denial or abridgment of the right to vote. For instance, a State might require white and Negro electors to cast their ballots in different boxes, or in different parts of the booth, or even in different booths; or it might require them to register on different days, or before different registrars. If the Negro was given the same opportunity to register and vote as the white man, the requirements of separate registering and balloting would be race distinctions in the matter of

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suffrage, but they would not be denials or abridgments of the right to vote and, hence, might be supported under the Fifteenth Amendment. Any such requirements have not been found in the State Constitutions or statutes; they are only suggested as possible race distinctions which might be permissible.

It follows, therefore, that the race distinctions to be considered in this chapter exist, not in conformity to law, as in the case of separate schools and public conveyances, but in defiance of law or by legal subterfuges, and are properly called discriminations.

NEGRO SUFFRAGE BEFORE 1865

The suffrage requirements as to race up to 1865 serve as a background for the events after that date. A review ¹ of the acts of territorial government and State Constitutions of the Territories and States of the United States reveals the following facts: Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont appear not to have had any race distinctions in suffrage. Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, Ohio, Oregon, South Carolina, and West Virginia never permitted any but white males to vote at any time between the Revolution and 1865. The Constitutions of Kansas ² of 1855 and of Minnesota ³ of 1857 permitted civilized Indians to vote, though the same privilege was not extended to Negroes. Kentucky, ⁴ in 1799, gave the suffrage to "free" persons, but expressly excepted Negroes, mulattoes, and Indians. Tex-

as,⁵ in 1845, gave the right to vote to free male persons but excepted Indians not taxed, Africans, and descendants of Africans.

Besides the above-named States which either made no race distinctions at all or else always made distinctions as to Negroes, several States, at one time or another, extended a limited suffrage to Negroes. The Constitution of New York⁶ of 1821, giving the right to vote to male citizens, had the provision that "no man of color, unless he shall have been for three years a citizen of this State, and for one year next preceding any election shall be seized and possessed of a freehold estate of the value of two hundred and fifty dollars, over and above all debts and incumbrances charged thereon, and shall have been actually rated and paid a tax thereon, shall be entitled to vote at any such election." There was no property test for white voters. The Constitution⁷ of 1846 had the same provision about Negro voters. The question of equal suffrage to Negroes was submitted⁸ separately in 1846, and rejected by a vote of 85,306 to 223,834. It was again submitted in 1860, with like result, the vote being 197,503 to 337,984.

The Constitution of North Carolina⁹ of 1835, as amended, provided that no free Negro, free mulatto, or free person of mixed blood, descended from Negro ancestors to the fourth generation inclusive, though one ancestor in each generation might have been a white person, should vote for members of the "senate or house of commons" of the State. Negroes who paid a certain poll tax were allowed to vote until this Amendment went into effect. Governor W. W. Kitchin,¹⁰ of that State, says:

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"There were 21,000 free Negroes in North Carolina in 1835, 4,000 of whom were entitled then to vote" After 1835 Negroes were not allowed to vote there again until after the War.

The Constitution of Tennessee ¹¹ of 1834 provided that no person should be disqualified from voting in any election who was then by the laws of the State a competent witness in a court of justice against a white person. One cannot tell how many Negroes were qualified to vote under this provision. The Constitution of Wisconsin ¹² of 1848 limited the privilege of voting to white persons, but the Supreme Court ¹³ of that State held in 1866 that suffrage had been extended to Negroes by a vote of the people at the general election on November 6, 1849.

Several States which at first allowed Negro freemen to vote later withdrew the privilege. Until the Revolution, they were allowed to vote in every State except Georgia and South Carolina. Between 1792 and 1834, Delaware, Maryland, Virginia, and Kentucky denied the suffrage to Negroes. As has been seen, North Carolina permitted as restricted Negro suffrage until 1835. New Jersey took the suffrage from the Negro in 1807, Connecticut in 1814, and Pennsylvania in 1838; and Tennessee, in 1834, limited the right to those Negroes who were competent as witnesses against white persons. New York, in 1821, required a very high property qualification not required of white persons.¹⁴ Wisconsin alone changed its law so as to allow Negroes to vote on equality with white persons. New York tried twice to do so, but failed each time.

SUFFRAGE BETWEEN 1865 AND 1870

In each of the acts of territorial government drawn up by Congress, suffrage was restricted to free white persons. This fact, together with the fact that the West Virginia Constitution of 1861-63 also restricted the suffrage to white persons, tends to show the attitude of the National Government in the early days toward Negro suffrage.

SUFFRAGE BETWEEN 1865 AND 1870

In 1865, the only States that permitted Negroes to vote on the same footing as white persons were Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, and Wisconsin. New York and Tennessee permitted a restricted Negro suffrage.

The changes in the suffrage laws between 1865 and 1870 indicate what might have taken place had not the United States interfered with the Fifteenth Amendment. The Reconstruction Constitutions¹⁵ of the Southern States in 1868 and 1869 extended the suffrage to Negroes. These Constitutions, however, did not express the will of the Southern white people at the time in regard to suffrage. The Constitution of Maryland,¹⁶ of 1867, permitted only white persons to vote; and that of Nebraska,¹⁷ of 1866-67, under which it sought admission to the Union, did not give the suffrage to Negroes.

Negro suffrage was voted down in New York¹⁸ in 1868, as it had been in 1846 and 1860, by a vote of 282,403 to 249,802. By the act of territorial government of Colorado, of 1861, suffrage was restricted to white persons. But an act of the legislature¹⁹ of that Territory, enacted in November, 1861, seemed to extend the right

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to vote to Negroes. This was amended,²⁰ however, in 1864, by expressly excluding Negroes and mulattoes from the suffrage. The legislature of Connecticut²¹ of 1865 proposed an amendment to the Constitution whereby Negroes would be given the right to vote, the same to be submitted to the people for their ratification. Minnesota²² and Wisconsin,²³ in 1865, submitted constitutional amendments providing for Negro suffrage. According to Representative Hardwick,²⁴ of Georgia, "Negro suffrage was rejected by decisive majorities." It was after the 1865 Amendment had been defeated at the polls in Wisconsin that the Supreme Court of that State, as has been seen, held that Negroes had been given the right to vote by a law of 1849.

The word "white" was stricken from the Constitution of Iowa²⁵ by the legislature of 1867-68, and this action was ratified by a vote of 105,384 to 81,384. Minnesota²⁶ amended its Constitution in 1868 so as to extend suffrage to Negroes. On December 30, 1867, the word "white" was stricken from the election laws of Dakota Territory.²⁷

On June 8, 1867, Congress passed, over the President's veto, a bill first introduced in 1865 establishing Negro suffrage in the District of Columbia. Before its passage, provision had been made by Congress to submit the question to a vote of the people. The extension of suffrage to Negroes was rejected by a vote of 6,521 to 35 in Washington City and 812 to 1 in Georgetown. In spite of this vote the Thirty-ninth Congress ordained Negro suffrage for the District. After four years, the government of the District was so changed that suffrage was taken from all

the residents. In 1866, Congress established Negro suffrage in all the Territories of the United States.²⁸

The second section of the Fourteenth Amendment, proposed June 16, 1866, and declared in force June 28, 1868, reads: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." The Amendment did not prohibit the denial or abridgment of the right to vote on account of race or color, but provided that, if such right was denied or abridged, the State must suffer the consequence of having its representation in Congress reduced. One feels safe in saying that the purpose of the National Government in adopting this section of the Fourteenth Amendment was to induce the States, particularly the Southern States, to extend suffrage to the Negro. With the possible exception of Minnesota, no State appears to have heeded the warning between 1868 and 1870.

One cannot say what would have been the result had

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the National Government rested there—whether or not of their own accord the various States would have extended the suffrage to Negroes—because, within less than two years, the Fifteenth Amendment had deprived the States of any choice in the matter by providing that they *must* not deny or abridge the right to vote on account of race or color.

SUFFRAGE BETWEEN 1870 AND 1890

At the time of the ratification of the Fifteenth Amendment, in 1870, the following States still restricted the suffrage to white persons: California, Colorado, Connecticut, Delaware, Indiana, Kansas, Kentucky, Maryland, Michigan, Nevada, New Jersey, Ohio, Oregon, and Pennsylvania. Illinois²⁹ adopted a new Constitution in 1870 which omitted the word "white." Missouri³⁰ amended its Constitution on November 8, 1870, after the Fifteenth Amendment went into effect, by erasing the word "white," and Virginia,³¹ in its Constitution of 1870, extended the suffrage to "male citizens." It is needless to say that all the Constitutions adopted since 1870 have omitted the word "white" from the suffrage qualifications, so it is not worth while to note the various Constitutions and Amendments that have been adopted since that date. But in some State Constitutions which have not been changed within the last forty years, one still finds the provision that only "white male citizens" are electors. This is true of Maryland.³² Attempts have been made to amend the Constitution by erasing the word "white," but the objection has been made that it is null and void³³ anyway by the Fifteenth Amendment, and that it would

be too expensive to call a constitutional convention or hold an election solely for the purpose of erasing a "dead" word.

The history of the ratification of the Fifteenth Amendment—the opposition it provoked and the means that had to be adopted to procure its ratification by the Southern States—is found in the records of Congress, newspapers, and political discussions of that day. Very little of it has been preserved in the laws of the States. In the following resolution by the legislature of Oregon³⁴ is found one of the few traces of the opposition to the Amendment occurring in the laws of a State outside the South:

"Whereas, the State of Oregon was, on the fourteenth day of February, A.D., 1859, admitted into the Federal Union, vested with the right to declare what persons should be entitled to vote within her boundaries; and until she, by her voluntary act, surrenders that right, the Congress of the United States has no authority to interfere with the conditions of suffrage within the boundaries of the State of Oregon: and

"Whereas, the Congress of the United States, by means of an arbitrary majority of votes acquired by the power of the bayonet, has sought to force upon the several States the so-called Fifteenth Amendment to the Federal Constitution, in direct violation of the terms under which the State of Oregon was admitted into the Sisterhood of States; therefore

"Be it resolved by the Senate, the House concurring:

"That the so-called Fifteenth Amendment is an infringement upon the popular rights, and a direct falsifica-

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tion of the pledges made to the State of Oregon by the Federal Government.

"Resolved, that the said Fifteenth Amendment be and the same is hereby rejected.

"Resolved, that the Governor be requested to transmit copies of this resolution to the Secretary of State of the United States and to the Senators and Representatives from the State of Oregon in the Congress of the United States."

The probable explanation of this opposition of Oregon to the Fifteenth Amendment lies in its unwillingness to give the ballot to the Japanese, Chinese, and Indians in the State.

The feeling of New York³⁵ toward Negro suffrage in 1870 appears to be different from that of Oregon. A statute was passed prohibiting any registrar or inspector of elections to demand any oath or ask any questions of a Negro different from what was demanded of white persons, or to reject the name of any colored person from registry except for the same causes as would make it his duty to reject the name of a white person. The violation of this statute was a misdemeanor, punishable by a fine of five hundred dollars and imprisonment for six months.

In order to make the prohibitions of the Fifteenth Amendment effective, on May 31, 1870, two months after the ratification of the Amendment, Congress passed an Act,³⁶ the first section of which reads: "All citizens of the United States, who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial division,

shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude, any constitution, law, custom, usage, or regulation in any State, Territory, or by or under its authority, to the contrary notwithstanding."

The fourth section of the "Enforcement Act," as the Act of 1870 was called, provided for the punishment of any person who should, by force, bribery, threats, intimidation, or other unlawful means, hinder, delay, or combine with others to hinder, delay, prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at any election.

In 1875, two inspectors of a municipal election in Kentucky were indicted for refusing to receive and count the vote of a Negro. The Supreme Court ³⁷ of the United States, to which the case came by reason of a division of opinion of the Circuit Court, held that the Fifteenth Amendment did not confer the right of suffrage, but rather invested citizens with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude. The fourth section of the Act of 1870, by its language, did not confine its operation to unlawful discrimination on account of race or color and was, therefore, unconstitutional. The "Enforcement Act" of 1870, like the Civil Rights Bill of 1875, failed in its desired effect because it was too far-reaching in its scope. Had the Act of 1870 been upheld, the Federal authorities would have taken complete control of all elections, State as well as Federal.

The years between 1870 and 1890 are known for the

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actual race distinctions in suffrage. Between 1870 and 1877, the white people of the South were largely disfranchised, not because of their race, but because of their participation in the War. After 1877, the Negroes were largely disfranchised by unlawful methods adopted by the white people of the South. If this were a history of the actual race distinctions in suffrage, it would be necessary to consider at length the "tissue ballots," the stuffing of ballot boxes, the intimidation of Negroes by the Ku Klux Klan and other bodies of white men, and other election devices and practices in the South at that time. But this study, as has been said before, is confined to the race distinctions *in* the law, not those *in defiance* of the law. Out of all the suffrage irregularities of the period very little suffrage law was evolved. Few judicial decisions and no statutes bearing directly on the relation of race to suffrage have been found.

Some cases of intimidation of Negroes at the polls reached the courts of record. In Lawrence County, Ohio, in 1870, for instance, two white men by threats of violence kept three Negroes from voting. One of the white men was convicted in the Federal court³⁸ under the Act of 1870, and imprisoned six months; the other was acquitted because he had not been heard to use threatening language. In 1871 a white man in South Carolina was convicted in the Federal court³⁹ for conspiring to keep a Negro from voting at a congressional election. The same year, in a contested election for mayor of Leavenworth, Kansas, the defeated candidate claimed that he would have been elected had not a number of Negroes been improperly kept from voting. He did not show that they

had been in the ward thirty days as required by the election law of the State, and the court ⁴⁰ held that Negroes must satisfy the same requirements as to residence as other voters. In a State election in Louisiana, in 1872, it was claimed, upon the affidavits of four thousand voters, that the votes of ten thousand Negroes had been suppressed because of their race and color.⁴¹ A tax collector in Delaware, in 1873, refused or failed to collect taxes from Negroes when the payment of taxes was a prerequisite to voting. The Federal court ⁴² held that it had jurisdiction because the tax collector was a State officer and, thus, it was the State denying and abridging the right to vote on account of race. Over one hundred men were indicted in the Federal court of Louisiana in 1874 for intimidating Negroes at the polls.⁴³ The same year the judges of the municipal election of Petersburg, Virginia, were indicted for refusing to allow a number of Negroes to vote.⁴⁴ In 1878, a Negro in Illinois who was denied the right to vote at a school election sued and recovered a hundred dollars damages.⁴⁵ In Georgia, in 1844, several white men were convicted in the circuit court of the United States for intimidating, beating, and maltreating Negroes to keep them from voting. The Supreme Court ⁴⁶ held that Congress had power to regulate Federal elections and could prevent such intimidation.

It will be noticed that nearly all of the cases cited above are along the same line—intimidation of Negroes to keep them from voting. Several constitutional principles, however, relating to suffrage were evolved out of the cases decided during this period. In some of these cases a Negro was not a party at all. It was thought at

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first, for instance, that suffrage was a right of citizenship and that the Fourteenth Amendment entitled every citizen to vote. Consequently, a proceeding was started in the courts of Kentucky in 1874 to establish the right of a woman to vote. The case went up to the Supreme Court ⁴⁷ of the United States which held that the Constitution of the United States does not confer the right of suffrage upon anyone. Next, it was thought that the Fifteenth Amendment conferred the right to vote upon Negroes, but the case of *United States v. Reese* settled this point by deciding that the Amendment did not confer upon Negroes the right to vote, but the right not to be discriminated in voting on account of race, color, or previous condition of servitude. Despite the Fourteenth and Fifteenth Amendments, the principle remains that the individual States retain the right to prescribe the qualifications for voting so long as they do not discriminate against persons on account of race, color, or previous condition of servitude.

SOUTHERN SUFFRAGE AMENDMENTS SINCE 1890

In 1890, a distinct departure was made in the development of the law of suffrage. For thirteen years, roughly speaking, the Negroes had been in a great measure disfranchised by the illegal means already referred to. According to the Constitutions and laws of the Southern States, the Negro had precisely the same right to vote as the white person. Yet he did not vote, or, if he voted, his ballot came to naught. The Southern white people, wearied of using underhand methods of eliminating the effect

of Negro suffrage, turned to seek a method under the law to accomplish the same result. The Fifteenth Amendment seemed to offer an insuperable obstacle. The problem was how to evade this constitutional provision. Speaking of this difficulty, the Supreme Court of Mississippi ⁴⁹ said: "Within the field of permissible action under the limitations proposed by the Federal Constitution, the Convention [the Constitutional Convention of Mississippi, 1890] swept the field of expedients to obstruct the exercise of suffrage by the Negro race. By reason of its previous condition of servitude and dependency, this race had acquired or accentuated certain peculiarities of habit, or temperament, and of character, which clearly distinguished it as a race from the whites. A patient, docile people; but careless, landless, migratory within certain limits, without forethought; and its criminal members given to furtive offences rather than the robust crimes of the whites. Restrained by the Federal Constitution from discriminating against the Negro race, the Convention discriminated against its characteristics and the offences to which its criminal members are prone."

Beginning in 1890 the Southern States have, one by one, adopted new Constitutions or amended their old ones so as to change considerably the qualifications of voters. Suffrage amendments have been adopted by the Southern States in the following order: Mississippi,⁵⁰ 1890; South Carolina,⁵¹ 1895; Louisiana,⁵² 1898; North Carolina,⁵³ 1900; Alabama,⁵⁴ 1901; Virginia,⁵⁵ 1901; and Georgia,⁵⁶ 1908. Maryland ⁵⁷ has made two separate attempts, one in 1905 and the other in 1909, to amend its Constitution, but has failed in both instances. Florida, Arkansas, Ten-

nessee, and Texas have not made any constitutional changes in the matter of suffrage which might be called "Suffrage Amendments."

The phrase, "the Suffrage Amendments in the South," has been used so often that the idea prevails among those unfamiliar with the laws on the subject that suffrage qualifications in the Southern States are fundamentally different from those in other States. With the hope of making plain wherein suffrage laws in the South are similar to and wherein they differ from the corresponding laws of other States, a table of the qualifications of electors in all the States and Territories of the United States, including Alaska, Porto Rico, Hawaii, and the Philippines, is given (see pp. 322-339). The requirements for voters will be taken in the order given in the tables and considered with reference to the ways in which they lend themselves to race distinctions and discriminations.

Citizenship

In order to vote, one must be a citizen of the United States or an alien who has taken the formal step toward naturalization of declaring his intention to become a citizen, with the exception that, in a few States, an Indian who has severed his tribal relationship may vote. This suffrage qualification does not easily lend itself to race distinction or discrimination. It lies within the power of the United States, not of the States, to say what alien residents may become citizens.⁵⁸ If Congress says, as it does in the Chinese Exclusion Act,⁵⁹ that Chinese not natives of this country cannot become citizens, it follows that they cannot demand of a State the privilege of vot-

ing. At present, a statute⁶⁰ specially provides for the naturalization of aliens of African nativity and persons of African descent, requiring that the same rules shall apply to them as to free white persons.

The only case that has been found involving the citizenship of a Negro arose in Michigan in 1872.⁶¹ A Negro, born in Canada of parents who had been slaves in Virginia but who had gone to Canada in 1834, went to Michigan at the age of twenty. The question was whether he was a citizen of the United States and, so, entitled to registration as a voter. The Supreme Court of the State held that, when his parents went to Canada, they were no longer under the jurisdiction of this country. The son was not born of citizens of the United States, nor was he born under the jurisdiction of the United States, and, therefore, was not a citizen of the United States.

The citizenship requirement in the Southern States is essentially the same as that in other States and cannot be said, in any way, to involve a race distinction.

Age

In all of the States and organized Territories an elector must be twenty-one years of age or over. In the Philippines the age limit is twenty-three. There seems to be no possible race distinction in the age requirement. It may be that, because of the less careful record of dates of birth among Negroes, more of that race are unable to prove that they are twenty-one years old; but this is only a question of evidence.

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Sex

All except four of the States limit the suffrage to males. This requirement cannot possibly involve a race distinction.

Residence

All States and Territories require that the voter shall have resided for a certain length of time previous to the election in the particular State or Territory, in the County, and in the precinct, ward, town, or other political division in which he offers to vote. The residence in the State varies from three months to two years, in the County or its corresponding division from thirty days to one year, and in the precinct, ward, or town from ten days to one year. It is noticeable that in the Southern States the required residence is, as a rule, somewhat longer than in the other States. Alabama, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia all require a residence of two years in the State, while Rhode Island is the only State outside the South that requires a State residence of that length. Mississippi is the only State that requires a voter to be a resident of the precinct one year. Louisiana requires six months in the precinct, while thirty days is the favorite residence with the other States.

The greater term of residence required in the South may lend itself to race distinction in case one race is more migratory than the other. If, for instance, the Negro is more apt to move about from place to place than the white person, more Negroes than whites will be unable to satisfy the residence qualification.

Payment of Taxes

The following States require the payment of poll taxes as a prerequisite to voting: Alabama, Arkansas, Florida, Louisiana, North Carolina, South Carolina, and Tennessee. Of these Alabama, Arkansas, and North Carolina require the payment of the poll tax for only one year preceding the election; Florida, Louisiana, and Mississippi, for two years preceding; and Virginia, for three years preceding the election. Some States require payment of both property and poll taxes; and some, only the latter. The law of Delaware is that the voter must have paid a county tax within two years, assessed six months before the election, not specifying whether it is a poll or property tax. Georgia provides that all taxes legally required since 1877 must have been paid six months before the election. Pennsylvania requires the payment of a State or county tax within two years to be assessed two months and paid one month before the election. South Carolina demands, not only the payment of the poll tax, but of all taxes for the preceding year. In the Philippines, the elector must satisfy other tests or show payment of an annual tax of fifteen dollars.

The payment of taxes as a prerequisite to voting is not peculiar to the Southern States, such a requirement being found in Delaware, Pennsylvania, and the Philippines as well. The poll tax and the requirement of payment for more than the year next preceding the election are found mostly in the Southern States. In the Philippines alone, it appears, the payment of taxes is an alternative requirement; that is, if one cannot satisfy this qualification, he

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may, nevertheless, qualify under other tests; but in the States, he must not only show his payment of taxes but be qualified as well in other respects.

In two ways this qualification lends itself to race distinctions. In the first place, if Negroes are more shiftless and less inclined to pay their taxes than white people, more of them will be unable to satisfy this test. Secondly, if they are careless about preserving their tax receipts for one, two, or three successive years, they will be unable to prove the payment of taxes and, thereby, be disqualified to vote.

Ownership of Property

The next qualification may be said to be in a sense peculiar to the Southern States, yet not entirely so. In Rhode Island, one must own property worth one hundred and thirty-four dollars on which taxes of the preceding year have been paid or must pay an annual rental of seven dollars to be entitled to vote for city councillors and to vote on questions of finances. In Alaska, to be entitled to vote in municipal elections, one must be the owner of substantial property interests in the municipality. In the Philippines, the voter must be able to satisfy other tests or else be the owner of property assessed at two hundred and fifty dollars.

The property test in the Southern States is an alternative of the educational tests. That is, if the applicant cannot satisfy the educational test but can satisfy the property test, he may register and vote; or he may do so if he can satisfy the education but not the property test. Unless special mention is made at the time, this will be

understood in the following discussion of these two qualifications. When it is said that such and such property or educational qualification is required, it is meant only that it is required in case its alternative cannot be satisfied.

In Alabama, the property requirement is that the applicant for registration be the owner or the husband of the owner of forty acres of land in the State in which they reside or of real or personal property worth three hundred dollars upon which taxes for the preceding year have been paid. In Georgia the requirement is forty acres of land in the State or five hundred dollars worth of property in the State. In Louisiana, the requirement is three hundred dollars worth of property and payment of the personal taxes. South Carolina prescribes three hundred dollars worth of property on which the taxes for the preceding year have been paid. Of the Southern States which have altered their suffrage laws since 1890, Mississippi, North Carolina, and Virginia have not provided any permanent property test.

The property qualifications cause the disfranchisement of more of one race than of the other only in so far as the first is more shiftless and more delinquent in the payment of taxes than the other. If the Negro is given the same opportunity as the white to acquire property, he has an equal opportunity to register under the property clause of the suffrage laws.

Educational Test

In no sense is the educational qualification peculiar to the Southern States. As early as 1855, Connecticut required of voters ability to read the State Constitution.

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The present requirement, as amended in 1897, is ability to read the Constitution and statutes of the State in English. In 1857, Massachusetts added as a prerequisite to voting ability to read the Constitution of the State in English and write one's name. The Constitution of Wyoming of 1889 provides that the applicant for registration must be able to read the Constitution of the State. California, in 1894, required ability to read the Constitution in English and write one's name. Similar requirements were made in Maine in 1893 and in Delaware in 1900. In the territorial possessions of the United States, a Hawaiian elector must read, speak, and write English or Hawaiian, and a Filipino must speak, read, and write English or Spanish. In the Philippines this qualification is an alternative of the ownership of property; in Hawaii and the States mentioned above the educational qualification is absolute.

In the Southern States now to be considered, it is to be remembered that the applicant must satisfy either the education or the property test, not both. In Alabama he must be able to read and write the Constitution of the United States in English unless physically disabled. In Georgia he must be able to read and write in English the Constitution of the United States or of Georgia, or if physically disabled from reading and writing, to "understand and give a reasonable interpretation" of the Constitution of the United States or of Georgia, when read to him. In Louisiana he must be able to read and write and must make his application for registration in his own handwriting. Mississippi requires that the applicant must be able to read or understand or reasonably interpret any

part of the Constitution of the State. North Carolina requires ability to read and write the State Constitution in English; South Carolina requires also an ability to read and write the Constitution, but does not specify that the test must be in English. Virginia does not declare that the applicant must be able to read and write, but requires him to make his application for registration in his own handwriting, and prepare and deposit his ballot without aid. This does not apply to those registering under the "Grandfather Clause" to be considered later.

All States⁶² and Territories, except Georgia, Missouri, New Jersey, North Carolina, South Carolina, and New Mexico have adopted a blanket official ballot which is, in effect, the requirement of an educational qualification for voting. By this system the State provides a uniform ballot containing the names of all persons of all parties to be voted for, and requires the voter to mark and deposit his own ballot. Where no party emblem—as the elephant, cock, or anvil—heads the list of candidates of a particular party, it is wellnigh impossible for one to mark his ballot properly unless he is able both to read and write.

The Southern States are more lenient in their educational tests than other States in allowing a person otherwise qualified to vote if he has either education or property; while in the latter he must have a certain amount of education no matter how much property he owns.

Educational qualifications easily permit race distinctions in several ways. In the first place, registration officers may give a difficult passage of the Constitution to a Negro, and a very easy passage to a white person, or *vice versa*. He may permit halting reading by one and re-

quire fluent reading by the other. He may let illegible scratching on paper suffice for the signature of one and require of the other a legible handwriting. But race discriminations in such cases rest with the officers; they do not have their basis in the law itself.

The educational clause of the proposed Maryland suffrage amendment, recently defeated at the polls by the voters of that State, restricted the right to vote to a "person who, in the presence of the officers of registration, shall, in his own handwriting, with pen and ink, without any aid, suggestion, or memorandum whatever addressed to him by any of the officers of registration, make application to register correctly, stating in such application his name, age, date, and place of birth; residence and occupation at the time and for the two years next preceding; the name or names of his employer or employers, if any, at the time and for the two years next preceding; and whether he has previously voted, and, if so, the State, county, city, and district, or precinct in which he voted last. Also the name in full of the President of the United States, of one of the Justices of the Supreme Court of the United States, of the Governor of Maryland, of one of the Judges of the Court of Appeals of Maryland, and of the Mayor of Baltimore City, if the applicant resides in Baltimore City, or of one of the County Commissioners of the County in which the applicant resides." It is easy to see how race discriminations could have been made under this proposed amendment, but it need not be discussed inasmuch as it failed to become law.

"Grandfather Clauses"

The "Grandfather Clauses" are, in a real sense, peculiar to the Southern States, though there are a few somewhat similar provisions in other States. For instance, Illinois, by its Constitution of 1870, allowed those to vote who had the right to vote on April 1, 1848, provided, of course, they satisfied the age, sex, and residence qualifications. When Maine added its educational requirement in 1893, it provided that this qualification should not apply to anyone who had the right to vote in January, 1893, or to anyone sixty years of age at that time. Massachusetts had made a similar provision in 1857. The Constitution of Wyoming of 1889 had said that nothing in it, except the provisions about idiots, lunatics, and convicts, should be construed to deprive any one of the right to vote who had that right at the time of the adoption of the Constitution. New Hampshire does not allow paupers to vote, but it provides that one who served in the Rebellion and was honorably discharged shall not be disfranchised because he has received aid from the public. In the Philippines, one unable to satisfy the educational or property test, may, nevertheless, vote if he held a substantial office under the Spanish régime.

The principle of the "Grandfather Clause," in short, is that one who is not able to satisfy either the educational or property tests may, nevertheless, continue to be a voter for life if he was a voter in 1867 or is an old soldier or the lineal descendant of such voter or soldier, provided he registers prior to a fixed date. Alabama permits all who served honorably in the forces of the United States in the

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War of 1812, the War with Mexico, any war with Indians, the War between the States, the War with Spain, or in the forces of the Confederate States or of the State during the War between the States and the lawful descendants of those and all who are of good character and who understand the duties and obligations of citizens under a republican form of government, to register before December 20, 1902. The clause in the Georgia Constitution is like that of Alabama, except that the privilege is extended to veterans of the Revolutionary War and their descendants, and the character and understanding clause is permanent. To take advantage of the "Grandfather Clause" in Georgia one must register before January 1, 1915. Louisiana provided that one entitled to vote in any State January 1, 1867, son or grandson of such a one twenty-one years old or over in 1898, or a foreigner naturalized before January 1, 1898, who had resided in the State five years preceding his application for registration, might register before September 1, 1898. North Carolina allowed one who had the right to vote on January 1, 1867, and the lineal descendant of such a one to be registered prior to December 1, 1908. Before January 1, 1898, one could register in South Carolina who could read the Constitution of the State or understand and explain it. In Virginia one might register up to 1904 who, before 1902, served in the army or navy of the United States or of the Confederate States or of Virginia or who was the son of such a one, or who owned property on which the State tax was one dollar, or who was able to read and explain or to understand and explain the Constitution of the State. Mississippi has no "Grandfather Clause."

SOUTHERN SUFFRAGE AMENDMENTS SINCE 1890

In Alabama, Georgia, and Virginia, the fact that one was a soldier enabled him to register under the "Grandfather Clause"; in Louisiana and North Carolina, that he was a voter in 1867. In each State the lineal descendants of such soldiers or voters in 1867 might register under the "Grandfather Clause." In Alabama one might register, though he was not an old soldier or descendant of one, if he understood the duties and obligations of citizenship and was of good character. In Virginia and South Carolina, one could register under the "Grandfather Clause" if he could understand and explain the Constitution when read to him; and, in Virginia, if he owned property taxed as much as one dollar a year.

The "Grandfather Clauses" are all temporary. Those classes of men covered by the clauses are given a certain time within which to have their names entered on a permanent registry. If they are once entered on the permanent register, they are voters for life unless excluded because of some crime or because they become public charges. If they fail, however, to register within the limited time, and still wish to become electors, they must satisfy the same tests as other applicants for registration. For instance, one who could vote in North Carolina in 1867 might have his name entered on the permanent register prior to December 1, 1908, and thereby become a voter for life, though he had neither property nor literacy; if he failed to register by that date, he had to satisfy the educational test as any other applicant would have to do. The length of duration of the "Grandfather Clauses" varies from a few months to several years. Thus, the "Grandfather Clause" of South Carolina was of avail

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from 1895 to 1898; of Louisiana, from May 16, 1898, to September 1, 1898; of North Carolina, from July 1, 1900, to December 1, 1908; of Alabama, from 1901 to 1903; Virginia, from 1902 to 1904; and in Georgia, it extends from 1908 to 1915. It will be seen that Georgia is the only State in which the "Grandfather Clause" is still in force. All who registered within the dates given above are still electors and will continue to be as long as they live unless excluded from the suffrage because of crime or the like; those who have not registered under the "Grandfather Clauses" cannot do so now, except in Georgia.

The "Grandfather Clauses" are more nearly race distinctions than any other sections of the suffrage laws for the reason that so many white men in the Southern States and so few Negroes are either old soldiers or descendants of old soldiers or had the right to vote in 1867. Yet they are not, technically speaking, race distinctions because, if one was a veteran or son of one, he might register regardless of his race or color. As a matter of fact, a considerable number of Negroes in the Southern States, who were Federal soldiers in the Civil War, have registered under the "Grandfather Clauses."

"Understanding and Character Clauses"

The "Understanding Clauses" do not have as large a place in the suffrage laws of the Southern States as is commonly believed. In only two States—Georgia and Mississippi—is the "Understanding Clause" permanent. In Georgia, one may register if he is of good character and understands the duties and obligations of citizens under

a republican form of government, although he has neither education nor property. In Mississippi, one who cannot read may register if he can understand and reasonably interpret the Constitution when read to him. A distinction must be made between these two "Understanding Clauses." In Georgia the requirement is the understanding of the duties of citizens of a republican form of government; in Mississippi it is understanding the State Constitution when read. In three other States—Alabama, South Carolina, and Virginia—the "Understanding Clause" of the Mississippi type is part of the "Grandfather" section, and became inoperative with the "Grandfather Clauses." The Georgia provision which allows one to register, regardless of education or property, if he is of good moral character has a prototype in the Constitutions of Connecticut which requires all electors to be of good moral character, and the Constitution of Vermont which requires the electors to be of quiet and peaceable behavior.

It cannot be doubted that the permanent "Understanding Clauses" of Mississippi and Georgia lend themselves to race discrimination. The Constitution of Mississippi provides that the applicant for registration must be able either to read or understand and reasonably interpret the Constitution. The registrar who so desires may easily disqualify members of one race by asking them to explain more difficult passages of the Constitution or by requiring of them a more scholarly interpretation of such passages than he demands of members of the other race whom he desires to have qualify as electors. In Georgia the registrar who passes upon an applicant's understanding of the duties and obligations of citizens under

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a republican form of government may set a higher standard for one race than for the other.

Persons Excluded from Suffrage

Certain classes of persons are excluded from the franchise because they are considered incapable or unfit to take a hand in governmental matters. The classes excluded are practically the same in all the States, and there is slight evidence of any race distinction in such cases. The following States do not allow paupers to vote: Delaware, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Texas, Virginia, and West Virginia. Other States, including Louisiana, Missouri, Montana, Oklahoma, and South Carolina, exclude the inmates of public institutions of charity, Louisiana and Oklahoma making an exception of Soldiers' Homes. Practically all the States exclude idiots and insane persons from the suffrage. Other classes, though not excluded from the suffrage, are not allowed to get the required residence to become electors. Thus, in a number of States, students in schools, unless self-supporting, do not get the required residence by living at the school. In a great majority of the States, soldiers and sailors in service do not gain an electoral residence in a State, county, or precinct by being stationed therein. California, Idaho, Nevada, and Oregon exclude all but American-born Chinese. Where the Chinese, because of the Federal naturalization laws, are incapable of becoming citizens, they cannot be electors, because all the States require the electors to be either citizens or persons who have formally declared their intention to become citizens. Idaho, Maine, Michi-

gan, Minnesota, Mississippi, North Dakota, Oklahoma, Washington, and Wisconsin exclude tribal Indians, or, what is perhaps the same, Indians not taxed.

All States exclude from the suffrage those who have been convicted of certain crimes; that is, those who may have served out their terms of imprisonment, but who have not been restored to their civil rights by the executive department of the State. Treason and felonies like embezzlement and bribery are the crimes most frequently mentioned. One finds here a possible race distinction. The Southern States have greatly added to the list of crimes which operate as an exclusion from the suffrage. By the Constitution of Alabama of 1875, for instance, the following were excluded from suffrage: Those convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or any other crime punishable by imprisonment in the penitentiary. The last Constitution of Alabama is more specific; it mentions the following crimes as having the effect of excluding from the suffrage those convicted of them: Treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crimes involving moral turpitude; also any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of making or offering to make false

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return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector. Delaware and several other States, on the other hand, exclude only those who have been convicted of a felony. If, as the Supreme Court of Mississippi said, the Negro is more given to furtive offences than to the robust crimes of the whites, the exclusions of the Alabama law would seem to be directed toward these offences. If more Negroes than whites are guilty of such crimes as larceny and wife-beating, and of sexual irregularities, then the law operates to disqualify for the suffrage more Negroes than whites.

SUFFRAGE IN INSULAR POSSESSIONS OF UNITED STATES

The suffrage qualifications in the insular possessions of the United States are particularly significant in that they tend to show the present attitude of Congress toward the elective franchise. The Act of April 30, 1900, providing a government for the Territory of Hawaii, restricts suffrage to those who can speak, read, and write the English or Hawaiian language—a strict educational test. In the Philippines to be an elector one must be a native of the Philippines, twenty-three years of age or over, and must have paid an annual tax of fifteen dollars, or be the owner of property assessed at two hundred and fifty dollars, or be able to speak, read, and write English or Spanish, or have held substantial office under the Spanish régime. It will be noticed that the tax payment, educational, property, and office-holding tests are alternatives,

CONSTITUTIONALITY OF SUFFRAGE AMENDMENTS

so the satisfaction of any one of the four is sufficient. Manhood suffrage, as provided by the "Foraker Act" ⁶² of 1900, is still in force in Porto Rico. But this seems destined soon to give way to a restricted suffrage. Secretary of War Dickinson has recently issued a report on the conditions in Porto Rico in which he suggests an amendment of the suffrage laws to the effect that, after the general election of 1910, the qualified voters for any election shall consist only of citizens of the United States, who, with such other qualifications as are required by the laws of Porto Rico, "are able to read and write; or on the day of registration shall own taxable real estate in their own right and name; or who are on said day *bona fide* members of a firm or corporation which shall own taxable real estate in the name of such firm or corporation; or on the day of registration shall possess and produce to the Board of Registration tax receipts showing the payment of any kind of taxes for the last six months of the year in which the election is held." President Taft, in transmitting the report to Congress, indorsed Secretary Dickinson's suggestions, saying ⁶³: "It is much better in the interests of the people of the island that the suffrage should be limited by an educational and property qualification." The above suffrage qualifications for the insular possessions of the United States is evidence that the attitude of Congress toward universal suffrage has been considerably modified within recent years.

CONSTITUTIONALITY OF SUFFRAGE AMENDMENTS

The first "Suffrage Amendment" of the Southern States, that of Mississippi, was adopted twenty years ago,

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and yet no case involving the constitutionality of these laws has been squarely presented to the Supreme Court of the United States. The one most nearly in point was *Williams v. Mississippi* ⁶⁴ in 1898. Williams, a Negro, had been indicted by a jury composed wholly of white men. The law required that a juror should be an elector. Williams contended that the provisions of the Constitution about suffrage were a scheme to discriminate against Negroes, that the discrimination was effected, not by the wording of the law, but by the powers vested in the administrative officers. The United States Supreme Court refused to interfere, saying that the laws did not, on their face, discriminate against the races, and that it "had not been shown that their actual administration was evil, only that evil was possible under them."

Several suits ⁶⁵ have been brought, the purpose of which has been to test the constitutionality of these laws, but they have all been decided on points of procedure or on technical grounds.

At present, the suffrage laws of the Southern States stand judicially unimpugned in the light of the Fifteenth Amendment. Mr. John Mabry Mathews ⁶⁶ says that the Supreme Court has shown an "apparent desire to shift the duty of redressing such wrongs [those arising under the suffrage laws] upon the political department of the Government. So far as Congress has given any indication of its attitude upon the subject, it has intimated that the matter is one for judicial settlement. But the absence of congressional legislation would in any case hamper the efficiency of the courts in securing the practical enforcement of the Amendment. The real reason

behind the attitude of both Congress and the courts is the apathetic tone of public opinion, which is the final arbiter of the question. In the technical sense, the Amendment is still a part of the supreme law of the land. But as a phenomenon of the social consciousness, a rule of conduct, no matter how authoritatively promulgated by the nation, if not supported by the force of public opinion, is already in process of repeal."

It cannot be safely conjectured what the Supreme Court will say when it squarely faces the suffrage laws of the South in their relation to the Fifteenth Amendment. Until then, each is entitled to his opinion. That the citizenship, age, sex, and residence qualifications are in perfect conformity to the Amendment there is no doubt. The qualifications of tax payment, property, and education existed long before the Fifteenth Amendment in the States of the men most active in securing the adoption of that Amendment. It is hardly to be supposed that the Senators and Representatives from Massachusetts and Pennsylvania understood the Amendment they were advocating to be nullifying the suffrage laws of their respective States. Moreover, a property or educational test is not an abridgment or denial of the right to vote, because it lies within the power of everyone, regardless of race, to accumulate property and acquire literacy.

The "Grandfather Clauses" are the most doubtful parts of the suffrage laws. In one sense, they are not at all a denial or an abridgment of the right to vote. Granting that the property and educational tests are constitutional, the "Grandfather Clause," instead of abridging or denying, enlarges the right to vote by giving the suffrage

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to those who would be disqualified under the property or educational tests. Be that as it may, the Southern States are more uneasy about the constitutionality of these provisions than of any others. For instance, at the last two sessions of the legislature of North Carolina bills were introduced to extend the "Grandfather Clause" of that State to 1812 and 1816 respectively. In each case the bill was defeated, the argument against it being that it was unwise to open up the suffrage question again, lest the amendment be brought into court.⁶⁷

A leading thinker on constitutional law has given the unpublished opinion that the "Grandfather Clauses" are in violation of the tenth section of the first article of the Constitution of the United States, which says that no State shall grant any title of nobility. His idea is that an order of nobility is created whenever a class of persons is granted exceptional political privileges, that the old soldiers and lineal descendants constitute such a class, and that the title of nobility is "Elector," whether expressed or not.

If the "Grandfather Clause" should be declared unconstitutional on the ground just suggested or on any other ground, the next question would be whether that would nullify the other sections of the suffrage laws, such as the educational and property tests. This depends upon whether the different sections of the laws are separable, whether the legislature or the people would have adopted the educational and property tests, etc., if they had thought the "Grandfather Clause" unenforceable.⁶⁸ North Carolina prepared for just such a contingency by inserting the following section in its Suffrage Amendment: "That this

MARYLAND AND FIFTEENTH AMENDMENT

amendment to the Constitution is presented and adopted as one indivisible plan for the regulation of the suffrage, with the intent and purpose to so connect the different parts, and to make them so dependent upon each other that the whole shall stand or fall together."

MARYLAND AND FIFTEENTH AMENDMENT

In the preceding section it has been assumed that the Fifteenth Amendment is an integral part of the Constitution of the United States. Whether or not this assumption is warranted is brought into question by a recent action of the legislature of Maryland.

As has been said earlier in this chapter, Maryland has made two unsuccessful attempts to amend its suffrage laws in such a way as would disfranchise a large number of the present Negro voters in that State. The letter of the Constitution of Maryland at present restricts suffrage to *white* male citizens; but it has been taken for granted that the word "white" became inoperative under the Fifteenth Amendment.

Out of the discussion of Negro suffrage in Maryland has arisen the question whether or not the Fifteenth Amendment itself is valid. At the last session of the legislature of that State, that of 1910, the so-called Digges Bills were introduced and passed by both houses. The purpose of these bills was to disfranchise all Negroes who have not owned five hundred dollars' worth of property for two years before their application for registration, upon which all taxes have been paid during those two years. This disfranchisement applied only to State and municipal

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elections. The bills failed to become laws only because they were vetoed by the Governor of the State.

Upon the failure of the Digges Bills to be passed, a constitutional amendment⁹⁹ was drafted and approved by the required three-fifths of all the members of both houses of the legislature, which embodied the same features as the Digges Bills. This amendment is to be voted upon by the people at the general election in November, 1911. This amendment provides for the Australian ballot and for uniform election laws throughout the State. In the event of the amendment being declared unconstitutional, the laws now in force in Maryland are to be revived automatically.

The validity of the proposed Maryland amendment is directly dependent upon the invalidity of the Fifteenth Amendment. Under the proposed amendment, no property qualification whatever is required of *white* male citizens applying for registration, while a heavy property qualification is required of *every other* male citizen—and this must include Negroes—applying for registration. Thus, in violation of the Fifteenth Amendment, the right of citizens of the United States to vote would be denied or abridged by the State of Maryland on account of race or color.

The validity of the Fifteenth Amendment is questioned on the following grounds, among others: (1) The fifth article of the Federal Constitution provides that Congress, "whenever two-thirds of both houses shall deem it necessary," shall propose amendments to the Constitution. It is claimed that only thirty-nine of the sixty-six members of the Senate, less than two-thirds, voted to submit the

Fifteenth Amendment to the States for their ratification.

(2) Maryland was one of the two States—the other being Delaware—that refused to ratify either the Thirteenth, Fourteenth or Fifteenth Amendment. It is claimed, therefore, that Maryland is not bound by the Fifteenth Amendment, which it did not ratify. (3) The fifth article of the Constitution, after providing the two ways in which the Constitution may be amended, adds that “no State, without its consent, shall be deprived of its equal suffrage in the Senate.” Upon this last clause, Mr. Arthur W. Machen, Jr., in a recent article in *The Harvard Law Review*,⁷⁰ has founded an ingenious argument that the Fifteenth Amendment is void. His reasoning on this point is, in brief, that the State meant here is the citizens or voters or the government of the State, and not the territory. By the enfranchisement of the Negroes after the War, the composition of the State was changed, a body of persons became part of the State who were not a part of it before, and thus the State was deprived of its equal suffrage in the Senate. Mr. Machen says: “The Fifteenth Amendment amounts to a compulsory annexation to each State that refused to ratify it of a black San Domingo within its borders. It is no less objectionable than the annexation of the San Domingo in the Spanish main.”

Whether or not any or all of the above objections and the others that are urged against the Fifteenth Amendment are valid cannot now be answered, because the validity of the Amendment has been assumed by the courts rather than decided upon after argument. Until after the election of November, 1911, attention will be centered upon Maryland. If the proposed amendment to the State

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Constitution is ratified by the people, then haste will no doubt be made to have its constitutionality tested, in which case the validity of the Fifteenth Amendment will be directly raised. The Southern States, as a rule, deplore this action on the part of Maryland because they fear that it will open up the whole suffrage question. It is deplored by people over the country as a whole because they fear that it will revive the ill feeling among the sections occasioned by Reconstruction.

EXTENT OF ACTUAL DISFRANCHISEMENT

It is imposible to say how many persons have been disfranchised under the suffrage laws. No doubt many who are capable of satisfying the qualifications do not register, or, if they register, do not vote. This is probably due to the one-party system in the South. The following figures show either the extent of actual disfranchisement or the political apathy in the Southern States: In one county in Mississippi, with a population of about 8,000 whites and 11,700 Negroes in 1900, there were only twenty-five or thirty qualified Negro voters in 1908, the rest being disqualified, it is said, on the educational test. In another county, with 30,000 Negroes, only about 175 were registered voters. In still another county of Mississippi, with 8,000 whites and 12,000 Negroes, only 400 white men and about 30 Negroes are qualified electors. The clerk of court of a county in North Carolina, with a population of 5,700 whites and 6,700 Negroes, writes that a Negro has never voted in the County. As a general rule, taking the country at large, about one person in five is a male of voting age. In Iowa four out of five possible voters have

EXTENT OF ACTUAL DISFRANCHISEMENT

actually voted in the last four elections; in Georgia, a State of nearly the same population, the proportion is one to six. In Mississippi, in 1906, only one out of eighteen males of voting age actually voted; in Georgia, one out of fifteen. In a district in Mississippi with a population of 190,885, 2,091 votes were cast for the Representative, John Sharp Williams, in 1906; in a district in Connecticut with a population of 247,875, 46,425 votes were cast for Representative Litchfield. These figures show that the ratio of actual voters to total population in the Southern States is astoundingly smaller than in other States.⁷¹

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	Citizenship.	Age.	Sex.	PREVIOUS RESIDENCE IN—			Payment of Taxes.	Ownership of Property.	Educational Test.
				State.	County.	Precinct.			
Alabama ⁶⁴	Citizen of U. S. or alien who had declared intention by Nov. 28, 1901.	21 yrs.	Male.	2 yrs.	1 yr.	3 mo.	Poll taxes for preceding year paid by Feb. 1, before election.	Owner or husband of owner of 40 acres of land in State upon which he resides or of less personal property worth \$300 upon which taxes for preceding year have been paid.	Able to read and write Constitution of U. S. in English, un-physically disabled.
Arkansas ⁷²	Citizen of U. S. or alien who has declared intention.	21 yrs.	Male.	1 yr.	6 mo.	1 mo.	Poll tax for preceding year paid.		
California ⁷³	Citizen of U. S. for 90 days before election.	21 yrs.	Male.	1 yr.	90 da.	30 da.			Able to read Constitution in English and write name.
Colorado ⁷⁴	Citizen of U. S. or alien who has declared intention 4 mo. before election.	21 yrs.	Male or female.	1 yr.	90 da., 30 da. in city or town.	10 da.			
Connecticut ⁷⁵	Citizen of U. S.	21 yrs.	Male.	1 yr.	6 mo.	6 mo. in town.			Able to read Constitution or Statutes of State in English.

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	"Grandfather Clause."	"Character Clause."	"Understanding Clause."	PERSONS EXCLUDED FROM SUFFRAGE.				
				Paupers.	Insane.	Criminals.	Indians.	Chinese.
Alabama ⁶⁴	One might permanently register before Dec. 20, 1902 (1) fore Dec. 20, 1902, if he had honorably he was of good character in the forces acter and understood of the U. S. in the the duties and obligations of 1812, War gations of citizens with Mexico, any war under a republican with Indians, war between the States, war with Spain, or in the forces of the Confederate States or of Ala. during the war between the States, or (2) if he was the lawful descendant of one of the above.	One might permanently register before Dec. 20, 1902, if he had honorably he was of good character in the forces acter and understood of the U. S. in the the duties and obligations of 1812, War gations of citizens with Mexico, any war under a republican with Indians, war between the States, war with Spain, or in the forces of the Confederate States or of Ala. during the war between the States, or (2) if he was the lawful descendant of one of the above.			Idiots and insane.	Unpardoned convicts.		
Arkansas ⁷²					Idiots and insane.	Unpardoned convicts of felonies.		
California ⁷³	Educational test did not apply to men 60 years old when amendment took effect.				Idiots and insane.	Embezzlers of public money, Convicts of infamous crimes.		Natives of China.
Colorado ⁷⁴					Insane and non compos mentis.	Convicts in prison.		
Connecticut ⁷⁵		Voter must have good moral character.			Idiots and insane.	Unpardoned convicts of heinous crimes.		

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	Citizenship.	Age.	Sex.	PREVIOUS RESIDENCE IN—			Payment of Taxes.	Ownership of Property.	Educational Test.
				State.	County.	Precinct.			
Delaware ⁷⁶	Citizen of U. S.	22 yrs.	Male.	1 yr.	3 mo.	30 da.	Paid county tax within 2 years, assessed 6 mo. before election.		Able to read Constitution in English or write name.
Florida ⁷⁷	Citizen of U. S.	21 yrs.	Male.	1 yr.	6 mo.		Poll tax for 2 years preceding paid.		
Georgia ⁷⁸	Citizen of U. S.	21 yrs.	Male.	1 yr.	6 mo.		All taxes legally required since 1877 paid 6 mo. before election.	Owner of 40 acres of land in State on which he resides or of personal property in State worth \$500.	Able to read and write in English Constitution of U. S., or of Ga., unless physically disabled.
Idaho ⁷⁹	Citizen of U. S.	21 yrs.	Male or female.	6 mo.	30 da.				
Illinois ⁷⁹	Citizen of U. S.	21 yrs.	Male.	1 yr.	90 da.	30 da.			

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	"Grandfather Clause."	"Character Clause."	"Understanding Clause."	PERSONS EXCLUDED FROM SUFFRAGE.				
				Paupers.	Insane.	Criminals.	Indians.	Chinese.
Delaware ⁷⁶				Paupers.	Idiots and insane.	Unpardoned convicts of felonies.		
Florida ⁷⁷					Idiots and insane.	Unpardoned convicts.		
Georgia ⁷⁸	One may permanently register before Jan. 1, 1915 (1) if he has honorably served in forces of U. S. in Revolutionary War, War of 1812, War with Mexico, any war with Indians, war between the States, war with Spain, or in forces of Confederate States or of Ga. in war between the States, or (2) if he is lawful descendant of one of above.	One without property or education may vote, if he is of good moral character and understands the duties and obligations of citizens of U. S. or of Ga. under a republican form of government.	One physically disabled from reading and writing may vote if he can understand and reasonably interpret the Constitution of U. S. or of Ga. when read to him.		Idiots and insane.	Unpardoned convicts.		
Idaho ⁷⁹					Idiots, insane, and persons under guardianship.	Convicts of felony, bigamy, polygamy, and inmates of houses of ill-fame.	Tribal Indians not taxed.	Natives of China.
Illinois ⁸⁰	One who was an elector April 1, 1848, continued to be elector under new Constitution.					Unrestored convicts of felony or election bribery.		

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	Citizenship.	Age.	Sex.	PREVIOUS RESIDENCE IN--			Payment of Taxes.	Ownership of Property.	Educational Test.
				State.	County.	Precinct.			
Indiana ⁸⁰	Citizen of U. S. 21 yrs. or alien who has declared intention if resident in U. S. 1 yr. before election.	21 yrs.	Male.	6 mo.	60 da. in town.	30 da.			
Iowa ⁸¹	Citizen of U. S.	21 yrs.	Male.	6 mo.	60 da.				
Kansas ⁸²	Citizen of U. S. or alien who has declared intention.	21 yrs.	Male.	6 mo.		30 da.			
Kentucky ⁸³	Citizen of U. S.	21 yrs.	Male.	1 yr.	6 mo.	60 da.			
Louisiana ⁸³	Citizen of U. S.	21 yrs.	Male.	2 yrs.	1 yr.	6 mo.	Poll tax for 2 years preceding election worth \$300, on which, unless voter is 60 yrs. old.	Owner of property worth \$300, on which, taxes paid.	Able to read and write and make application for registration in his own handwriting.

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	"Grandfather Clause."	"Character Clause."	"Understanding Clause."	PERSONS EXCLUDED FROM SUFFRAGE.				
				Paupers.	Insane.	Criminals.	Indians.	Chinese.
Indiana ⁸⁰						Convicts of infamous crime during term fixed by court.		
Iowa ⁸¹					Idiots and insane.	Convicts of infamous crime.		
Kansas ⁸²					Insane and persons under guardianship.	Unrestored convicts of treason, felony, bribery, embezzlement.		
Kentucky ⁸³					Idiots and insane.	Convicts of treason, felony, and bribery.		
Louisiana ⁸⁴	One might permanently register before Sept. 1, 1898, (1) if he was entitled to vote in any State, Jan. 1, 1867, (2) son or grandson of such a one and 21 years old or over in 1898, or (3) a foreigner naturalized before Jan. 1, 1898, resident in State 5 years before application for registration.			Inmates of charitable institutions, except soldiers' homes.	Idiots and insane.	Felons under indictment.		

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	Citizenship.	Age.	Sex.	PREVIOUS RESIDENCE IN—			Payment of Taxes.	Ownership of Property.	Educational Test.
				State.	County.	Precinct.			
Maine ⁶⁴	Citizen of U.S.	21 yrs.	Male.	3 mo.					Able to read Constitution in English and write name.
Maryland ⁶⁵	Citizen of U.S.	21 yrs.	Male.	1 yr.	6 mo.				
Massachusetts ⁶⁶	Citizen of U.S.	21 yrs.	Male.	1 yr.	6 mo.	6 mo.			Able to read Constitution in English and write name.
Michigan ⁶⁷	Citizen of U.S. or alien who has declared intention before May 8, 1892.	21 yrs.	Male.	6 mo.	20 da.	20 da.			
Minnesota ⁶⁸	Citizen of U.S. 3 mo. before election.	21 yrs.	Male.	6 mo.	30 da.	30 da.			
Mississippi ⁶⁹	Citizen of U.S.	21 yrs.	Male.	2 yrs.	1 yr.	1 yr.	All taxes for 2 preceding years paid.		Able to read Constitution of State.

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	"Grandfather Clause."	"Character Clause."	"Understanding Clause."	PERSONS EXCLUDED FROM SUFFRAGE.				
				Paupers.	Insane.	Criminals.	Indians.	Chinese.
Maine ⁶⁴	Educational test did not apply to men who were entitled to vote when amendment took effect in 1893 or to men 60 years old at that time.			Paupers.	Persons under guardianship.		Indians not taxed.	
Maryland ⁶⁵					Lunatics, <i>non compos mentis</i> .	Unpardoned convicts of felony and bribery.		
Massachusetts ⁶⁶	Educational test did not apply to men who were entitled to vote when amendment went into effect in 1857 or to men 60 years old at that time.			Paupers.	Persons under guardianship.			
Michigan ⁶⁷						Duelists and accessories.	Tribal Indians.	
Minnesota ⁶⁸					Insane and persons under guardianship.	Unpardoned convicts of treason and felony.	Tribal Indians.	
Mississippi ⁶⁹			One without ability to read may vote if he can understand or reasonably interpret the Constitution.		Idiots and insane.	Convicts of felony and bigamy.	Indians not taxed.	

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	Citizenship.	Age.	Sex.	PREVIOUS RESIDENCE IN—			Payment of Taxes.	Ownership of Property.	Educational Test.
				State.	County.	Precinct.			
Missouri ⁸⁰	Citizen of U. S. or alien who has declared intention not less than 1 nor more than 5 years before election.	21 yrs.	Male.	1 yr.	60 da.	20 da.			
Montana ⁸⁰	Citizen of U. S.	21 yrs.	Male.	1 yr.	30 da.	30 da.			
Nebraska ⁸¹	Citizen of U. S. or alien who has declared intention 30 days before election.	21 yrs.	Male.	6 mo.	40 da.	10 da.			
Nevada ⁸²	Citizen of U. S.	21 yrs.	Male.	5 mo.	30 da.	30 da.			
New Hampshire ⁸³ ...	Citizen of U. S.	21 yrs.	Male.	6 mo.	6 mo.	6 mo.			
New Jersey ⁸⁴	Citizen of U. S.	21 yrs.	Male.	1 yr.	5 mo.				
New York ⁸⁵	Citizen of U. S. 90 days before election.	21 yrs.	Male.	1 yr.	4 mo.	30 da.			

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	"Grandfather Clause."	"Character Clause."	"Understanding Clause."	PERSONS EXCLUDED FROM SUFFRAGE.				
				Paupers.	Inane.	Criminals.	Indians.	Chinese.
Missouri ⁸⁰				Inmates of poorhouses or asylums at public expense.		Unpardoned convicts of infamous crimes.		
Montana ⁸¹				Inmates of public institutions.	Idiots and insane.	Unpardoned felons.	Indians.	
Nebraska ⁸¹					<i>Non compos mentis.</i>	Unrestored convicts of treason and felony.		
Nevada ⁸²					Idiots and insane.	Unpardoned convicts.	Indians.	Natives of China.
New Hampshire ⁸³	One who served in the Rebellion and has been honorably discharged is not disfranchised because he has received help from the public.			Paupers.				
New Jersey ⁸⁴				Paupers.	Idiots and insane.	Unpardoned or unrestored convicts.		
New York ⁸⁵						Unrestored convicts of crimes against suffrage.		

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	Citizenship.	Age.	Sex.	PREVIOUS RESIDENCE IN—			Payment of Taxes.	Ownership of Property.	Educational Tmt.
				State.	County.	Precinct.			
North Carolina ⁹¹	Citizen of U. S. 21 yrs.		Male.	2 yrs.	6 mo.	4 mo.	Poll tax for preceding year paid.		Able to read and write Constitution in English.
North Dakota ⁹⁵	Citizen of U. S. 21 yrs.		Male.	1 yr.	6 mo.	90 da.			
Ohio ⁹⁷	Citizen of U. S. 21 yrs.		Male.	1 yr.	30 da.	20 da.			
Oklahoma ⁹⁸	Citizen of U. S. 21 yrs.		Male.	1 yr.	6 mo.	30 da.			
Oregon ⁹⁹	Citizen of U. S. 21 yrs. or alien who has declared intention 1 year before election.		Male.	6 mo.					
Pennsylvania ¹⁰⁰	Citizen of U. S. 21 yrs. 1 month before election.		Male.	1 yr.	2 mo.	2 mo.	State or county tax paid within 2 years, and 1 mo. before election.		
Rhode Island ¹⁰¹	Citizen of U. S. 21 yrs.		Male.	2 yrs.	6 mo. in town.			Owner of property worth \$134 on which taxes of preceding year paid, or payer of a rental of \$7 a year to vote for city councillors or on finances.	

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	"Grandfather Clause."	"Character Clause."	"Understanding Clause."	PERSONS EXCLUDED FROM SUFFRAGE.				
				Paupers.	Insane.	Criminals.	Indians.	Chinese.
North Carolina ⁸⁵	One might be permanently registered before Dec. 1, 1908 (1) if he was entitled to vote Jan. 1, 1867, or (2) the lineal descendant of such a one.				Idiots and lunatics.	Unrestored convicts of felony and infamous crimes.		
North Dakota ⁸⁶					Insane, <i>non compos mentis</i> , under guardianship.	Unrestored convicts of treason and felony.	Tribal Indians.	
Ohio ⁸⁷					Idiots and insane.	Unpardoned convicts.		
Oklahoma ⁸⁸				Inmates of poorhouses and asylums, except soldiers' homes.	Idiots and insane.	Convicts of felony.	Tribal Indians.	
Oregon ⁸⁹					Idiots and insane.	Convicts of felony.		Natives of China.
Pennsylvania ¹⁰⁰						Convicts of crimes against suffrage.		
Rhode Island ¹⁰¹				Paupers.	Lunatics, <i>non compos mentis</i> , under guardianship.	Unrestored convicts.		

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	Citizenship.	Age.	Sex.	PREVIOUS RESIDENCE IN—			Payment of Taxes.	Ownership of Property.	Educational Test.
				State.	County.	Precinct.			
South Carolina ¹¹ . . .	Citizen of U. S.	21 yrs.	Male.	2 yrs.	1 yr.	4 mo.	All taxes for preceding year paid. Poll tax paid 6 mo. before election.	Owner of property worth \$300 upon which taxes for preceding year paid.	Able to read and write Constitution.
South Dakota ¹⁰² . . .	Citizen of U. S. or resident in U. S. 1 year, or alien who has declared intention.	21 yrs.	Male.	1 yr.	6 mo.	30 da.			
Tennessee ¹⁰³	Citizen of U. S.	21 yrs.	Male.	1 yr.	6 mo.		Poll tax for preceding year paid.		
Texas ¹⁰⁴	Citizen of U. S. or alien who has declared intention 6 mo. before election.	21 yrs.	Male.	1 yr.	6 mo.		Poll tax paid by Feb. 1, before election.		
Utah ¹⁰⁵	Citizen of U. S. 90 da. before election.	21 yrs.	Male or female.	1 yr.	4 mo.	60 da.			
Vermont ¹⁰⁶	Citizen of U. S.	21 yrs.	Male.	1 yr.	3 mo.	3 mo.			

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	"Grandfather Clause."	"Character Clause."	"Understanding Clause."	PERSONS EXCLUDED FROM SUFFRAGE.				
				Paupers.	Insane.	Criminals.	Indians.	Chinese.
South Carolina ⁸¹	One might permanently register before Jan. 1, 1898, if he could read the Constitution or understand and explain it.		One without ability to read might register before Jan. 1, 1898, if he could understand and explain the Constitution.	Paupers in public institutions.	Idiots and insane.	Unpardoned convicts.		
South Dakota ¹⁰²					Idiots, <i>non compos mentis</i> , under guardianship.	Unpardoned convicts.		
Tennessee ¹⁰³						Unpardoned convicts.		
Texas ¹⁰⁴				Paupers.	Idiots and lunatics.	Unpardoned or unrestored convicts.		
Utah ¹⁰⁵					Idiots and insane.	Unpardoned convicts.		
Vermont ¹⁰⁶		Voter must be of "quiet and peaceable behavior."				Unpardoned convicts.		

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	Citizenship.	Age.	Sex.	PREVIOUS RESIDENCE IN—			Payment of Taxes.	Ownership of Property.	Educational Test.
				State.	County.	Precinct.			
Virginia ⁴⁵	Citizen of U. S.	21 yrs.	Male.	2 yrs.	1 yr.	30 da.	State poll tax for 3 years preceding election paid, unless an old soldier.	One might be permanently registered before 1904 if he was the owner of property on which the State tax was \$1.	Able to make application for registration in his own handwriting, and to prepare and deposit ballot without aid.
Washington ¹⁰⁷	Citizen of U.S.	21 yrs.	Male.	1 yr.	90 da.	30 da.			
West Virginia ¹⁰⁸	Citizen of U.S.	21 yrs.	Male.	1 yr.	60 da.	Actual and <i>bona fide</i> resident.			
Wisconsin ¹⁰⁹	Citizen of U. S. or alien who has declared intention.	21 yrs.	Male.	1 yr.	10 da.	10 da.			

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	"Grandfather Clause."	"Character Clause."	"Understanding Clause."	PERSONS EXCLUDED FROM SUFFRAGE.				
				Paupers.	Insane.	Criminals.	Indians.	Chinese.
Virginia ⁶⁵	One might be permanently registered before 1904 (1) if, before 1902, he served in the army or navy of the U. S. or of the Confederate States or (2) if he was the son of such a one, or if he was the owner of property on which the State tax was \$1, or (4) if he was able to read and explain or understand and explain the Constitution of Va.		One without ability to read might be permanently registered before 1904, if he could understand and explain the Constitution of Va.	Paupers.	Idiots and insane.	Unrestored convicts and duellists.		
Washington ¹⁰⁷	One who was entitled to vote in 1889 continued to be a voter under the State Constitution.				Idiots and insane.	Unrestored convicts.	Indians not taxed.	
West Virginia ¹⁰⁸				Paupers.	Idiots and lunatics.	Convicts of treason, felony, and bribery in elections.		
Wisconsin ¹⁰⁹					Insane, under guardianship.	Convicts.	Tribal Indians.	

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	Citizenship.	Age.	Sex.	PREVIOUS RESIDENCE IN—			Payment of Taxes.	Ownership of Property.	Educational Test.
				State.	County.	Precinct.			
Wyoming ¹¹⁰	Citizen of U.S.	21 yrs.	Male or female.	1 yr.	60 da.	10 da.			Able to read Constitution of State in English.
Alaska ¹¹¹	Citizen of U.S. or alien who has declared intention.	21 yrs.	Male.	1 yr.	6 mo. in corporation.			To be voter in municipal election, one must own substantial property interests in the municipality.	
Arizona ¹¹²	Citizen of U.S.	21 yrs.	Male.	1 yr.	30 da.	30 da.			
Hawaii ¹¹³	Citizen of U.S.	21 yrs.	Male.	1 yr.	3 mo. in representative district.				Able to speak, read and write English or Hawaiian.
New Mexico ¹¹⁴	Citizen of U.S.	21 yrs.	Male.	6 mo.	3 mo.	3 mo.			
Philippines ¹¹⁵	Native of Philippines.	23 yrs.	Male.		6 mo. in district.		Annual tax of \$15 paid.	Owner of property assets at \$250.	Able to speak, read and write English or Spanish.
Porto Rico ¹¹⁶	Citizen of Porto Rico.	21 yrs.	Male.	1 yr.					

QUALIFICATIONS FOR VOTING IN THE UNITED STATES.

STATE OR TERRITORY.	"Grandfather Clause."	"Character Clause."	"Understanding Clause."	PERSONS EXCLUDED FROM SUFFRAGE.				
				Paupers.	Insane.	Criminals.	Indians.	Chinese.
Wyoming ¹¹⁰	One entitled to vote under old Constitution might continue to vote under new Constitution of 1889.				Idiots and insane.	Convicts of felony.		
Alaska ¹¹¹								
Arizona ¹¹²					Idiots, insane, under guardianship.	Convicts of felony.		
Hawaii ¹¹³					Idiots and insane.	Unrestored convicts.		
New Mexico ¹¹⁴						Unpardoned convicts.	Indians, until disabilities removed by Congress.	
Philippines ¹¹⁵	One may vote if he held substantial office under the Spanish regime.							
Porto Rico ¹¹⁶					Insane.	Unpardoned felons.		

SUFFRAGE

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¹ The following table, giving the dates of the Constitutions of the various States and the Organic Laws of the Territories with the sections referring to suffrage, up to and including 1865, indicates the extent to which suffrage was restricted to white people before and at that date. "White," "white freeman," "free white," etc., mean that only white persons or white freemen or free white persons had the elective franchise. Where the suffrage is given to male "citizens" or "inhabitants" whether Negroes were included depends upon whether they were treated in those States as "citizens" or "inhabitants."

Alabama,	Const.,	1819, art.	III, sec.	5. . White.
	"	1865, "	VIII, "	1. . "
Arkansas,	"	1836, "	IV, "	2. . Free white.
	"	1864, "	IV, "	2. . " "
California,	"	1849, "	II, "	2. . White.
Colorado,	Ter. Govt.,	1861,	"	5. . Free white.
Connecticut,	Const.,	1818, "	VI, "	2. . White.
	Amend.,	1845, "	VIII,	.. "
Delaware,	Const.,	1792, "	IV, "	1. . Free white.
	"	1831, "	IV, "	1. . " "
Florida,	Ter. Govt.,	1822,	"	11. . " "
	Const.,	1838, "	VI, "	1. . " "
	"	1865, "	VI, "	1. . " "
Georgia,	"	1777, "	IX,	.. White.
	"	1789, "	IV, "	1. . Citizens and in-
				habitants.
	"	1798, "	IV, "	1. . Citizens and in-
				habitants.
	"	1865, "	V, "	1. . Free white.
Illinois,	"	1818, "	II, "	27. . White.
	"	1848, "	VI, "	1. . "
Indiana,	"	1816, "	VI, "	1. . "
	"	1851, "	II, "	2. . "

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Iowa,	Ter. Govt., 1838,		sec. 5.. Free white.
	Const., 1846, art.,	II, "	1.. White.
	" 1857, "	II, "	1.. "
Kansas,	Ter. Govt., 1854,		5.. Free white.
	Const., 1855, "	II, "	2.. White.
	" 1857, "	VIII, "	1.. Citizens.
	" 1858, "	II, "	1.. "
	" 1859, "	V, "	1.. White.
Kentucky,	" 1792, "	III, "	.. Free citizens.
	" 1799, "	II, "	8.. " "
	" 1850, "	II, "	8.. Free white.
Louisiana,	" 1812, "	II, "	8.. " "
	" 1845, tit.	II, art. 10..	" "
	" 1852, "	II, "	10.. " "
	" 1864, "	III, "	14.. White.
Maine,	" 1820, art.	II, sec. 1..	Citizens.
Maryland,	" 1776, "	II, "	.. Free men.
	Amend., 1810, "	XIV, "	.. Free white.
	Const., 1851, "	I, "	1.. " "
	" 1864, "	I, "	1.. White.
Massachusetts,	" 1780, chap.	I, art. 4..	Freeholders.
	Amend., 1822, art.	III, "	.. Citizens.
Michigan,	Const., 1835, "	II, sec. 1..	White.
	" 1850, "	VII, "	1.. "
Minnesota,	Ter. Govt., 1849,		5.. Free white.
	Const., 1857, "	VII, "	1.. White.
Mississippi,	Ter. Govt., 1808,		1.. Free white.
	Const., 1817, "	III, "	1.. " "
	" 1832, "	III, "	1.. " "
Missouri,	Ter. Govt., 1812,		11.. " "
	Const., 1820, "	III, "	10.. " "
	" 1865, "	II, "	18.. White.
Nevada,	Ter. Govt., 1850,		5.. Free white.
	" " 1861,		5.. " "
	Const., 1864, "	II, "	1.. White.
New Hampshire,	" 1784, part	II, "	.. Inhabitants.
	" 1792, "	II, "	28.. " "
New Jersey,	" 1776, art.	IV, "	.. "
	" 1844, "	II, "	1.. White.
New York,	" 1777, "	VII, "	.. Inhabitants.

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New York,	Const.,	1821, art.	II, sec.	1. .	Citizens.
	"	1846, "	II, "	1. .	"
North Carolina,	"	1776, "	VII, "	..	Freemen.
	Amend.,	1835, "	I, "	3. .	" (Negroes excepted).
	"	1854,		..	Free white.
Ohio,	Const.,	1802, "	IV, "	1. .	White.
	"	1851, "	V, "	1. .	"
Oregon,	Ter. Govt.,	1848,	"	5. .	"
	Const.,	1857, "	II, "	2. .	" (Negroes excepted).
Pennsylvania,	"	1776, "	II, "	6. .	Freemen.
	"	1790, "	III, "	1. .	"
	"	1838, "	III, "	1. .	White freemen.
Rhode Island,	"	1842, "	II, "	1. .	Citizens.
South Carolina,	"	1776, res.	XI,	..	"As required by law."
	"	1778, "	XIII, "	..	Free white.
	"	1790, art.	I, "	4. .	" "
	Amend.,	1810,		..	" "
Tennessee,	Const.,	1796, "	III, "	1. .	Freemen.
	"	1834, "	IV, "	1. .	Free white.
Texas,	"	1836, "	VI, "	11. .	Citizens.
	"	1845, "	III,	..	Free (Negroes excepted).
Vermont,	"	1777, chap.	II, "	6. .	Men of quiet and peaceable behavior.
	"	1786, "	I, "	9. .	Men of quiet and peaceable behavior.
	"	1793, "	II, "	21. .	Men of quiet and peaceable behavior.
Virginia,	"	1830, art.	III, "	14. .	White.
	"	1850, "	III, "	1. .	"
	"	1864, "	III, "	1. .	"
West Virginia,	"	1861-63, "	III, "	1. .	"
Wisconsin,	Ter. Govt.,	1836,	"	5. .	Free white.
	Const.,	1848, "	III, "	1. .	White.

² Art. II, sec. 2.

³ Art. VII, sec. 1.

⁴ Const., 1799, art. III.

⁵ Const., 1845, art. III.

⁶ Art. II, sec. 1.

⁷ Art. III, sec. 1.

⁸ B. P. Poore: "Charters and Constitutions," II, p. 1353.

⁹ Amends. to Const. of 1776, art. I, sec. 3, par. 3.

¹⁰ Congressional Record, vol. 33, part 8, app. pp. 297,

et seq.

¹¹ Art. IV, sec. 1.

¹² Art. III, sec. 1.

¹³ Gillespie v. Palmer, 1866, 20 Wis. 544; Laws of Wis. 1849, p. 85.

¹⁴ Albert Bushnell Hart: "Slavery and Abolition," p. 83; "The Realities of Negro Suffrage" in the Proceedings of the American Political Science Association for 1906.

¹⁵ Ala., 1867, art. VII, sec. 1; Ark, 1868, art. VIII, sec. 2; Fla., 1868, art. XV, sec. 1; Ga., 1868, art. II, sec. 2; La., 1868, tit. VI, art. 98; Miss., 1868, art. VII, sec. 2; N. C., 1868, art. VI, sec. 1; S. C. 1868, art. VIII, sec. 1; and Texas, 1868, art. III, sec. 1.

¹⁶ Art. III, sec. 1.

¹⁷ Art. II, sec. 2.

¹⁸ B. P. Poore: "Charters and Constitutions," II, p. 1353.

¹⁹ Laws of Colo., 1861, pp. 71-72.

²⁰ *Ibid.*, 1864, pp. 79-80.

²¹ Pub. Acts of Conn., 1865, pp. 94-95.

²² Laws of Minn., 1865, pp. 118-19.

²³ Laws of Wis., 1865, pp. 517-18.

²⁴ Congressional Record, vol. 35, part 2, pp. 1270 *et seq.*

²⁵ Laws of Ia., 1868, pp. 290-91.

²⁶ Art. VII.

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- ²⁷ Laws of Dak. Ty., 1867-68, p. 255.
- ²⁸ Congressional Record, vol. 35, part 2, pp. 1270 *et seq.*
- ²⁹ Art. VII, sec. 1.
- ³⁰ Amend., 1870, art. II, sec. 1.
- ³¹ Art. III, sec. 1.
- ³² Const., 1867, art. I, sec. 1.
- ³³ Neal v. Del., 1880, 103 U. S. 370.
- ³⁴ Laws of Ore., 1870, pp. 190-91.
- ³⁵ Laws of N. Y., 1870, I, p. 922.
- ³⁶ 16 Stat. L., 140-46, chap. 94.
- ³⁷ U. S. v. Reese, 1875, 92 U. S. 214.
- ³⁸ U. S. v. Canter, 1870, Fed. Case No. 14,719.
- ³⁹ U. S. v. Crosby, 1871, Fed. Case No. 14,893.
- ⁴⁰ Anthony v. Halderman, 1871, 7 Kan. 50.
- ⁴¹ Kellog v. Warmouth, 1872, Fed. Case No. 7,667.
- ⁴² U. S. v. Given, 1873, Fed. Case Nos. 15,210 and 15,211.
- ⁴³ U. S. v. Cruikshank, 1874, Fed. Case No. 14,897; 92 U. S. 542 (1875).
- ⁴⁴ U. S. v. Petersburg (Va.) Judges of Election, 1874, Fed. Case No. 16,036.
- ⁴⁵ Bernier v. Russell, 1878, 89 Ill. 60.
- ⁴⁶ *Ex parte* Yarborough, 1884, 110 U. S. 651.
- ⁴⁷ Minor v. Happersett, 1874, 21 Wall. 162.
- ⁴⁸ 92 U. S. 214 (1875).
- ⁴⁹ Ratliff v. Beale, 1896, 20 S. 865.
- ⁵⁰ Const., 1890, art. XII, secs. 241 *et seq.*
- ⁵¹ Const., 1895, art. II.
- ⁵² Const., 1898, arts. 197, 198, and 202.
- ⁵³ Revised Stat., 1905, secs. 4315-17; Const., 1875, as amended 1900, art. VI.
- ⁵⁴ Const., 1902, secs. 177-82.
- ⁵⁵ Const., 1902, art. II, secs. 18 *et seq.*
- ⁵⁶ Laws of Ga., 1908, pp. 27-31.

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⁵⁷ W. P. Pickett: "The Negro Problem," 1909, G. P. Putnam's Sons, p. 250; Laws of Md., 1908, pp. 301-04.

⁵⁸ Const. of U. S., art. I, sec. 8, par. 4.

⁵⁹ 22 Stat. L., 61.

⁶⁰ Federal Stat., annotated, vol. 5, pp. 207-08.

⁶¹ *Hedgman v. Bd. of Registration*, 1872, 26 Mich. 51.

⁶² *The American Political Science Review*, vol. 4, p. 63 (Feb., 1910).

⁶³ 31 Stat. L., 82-83, chap. 191; Sixty-first Cong., 2d sess., H. Doc. No. 615; Congressional Record, vol. 45, p. 1199.

⁶⁴ *Williams v. Miss.*, 1898, 170 U. S. 213, at p. 225.

⁶⁵ *Mills v. Green*, 1895, 159 U. S. 651; *Jones v. Montague*, 1904, 194 U. S. 147; *Selden v. Montague*, 1904, 194 U. S. 153; *Giles v. Teasley*, 1904, 136 Ala. 164, and 193 U. S. 146; *Giles v. Harris*, 1903, 189 U. S. 475. For discussions of the constitutionality of the suffrage laws of the South see *The American Political Science Review*, vol. I, pp. 17, *et seq.*, and John Mabry Mathews: "History of the Fifteenth Amendment," 1909, The Johns Hopkins Press, pp. 97-127.

⁶⁶ Mathews: History of the Fifteenth Amendment, pp. 125-26.

⁶⁷ Raleigh, N. C., *News and Observer*, Nov. 9, 1907; Feb. 24, 25, and 28, 1909.

⁶⁸ See *Poindexter v. Greenhow*, 1884, 114 U. S. 270, at p. 304; and *Sprague v. Thompson*, 1883, 118 U. S. 90, at p. 95.

⁶⁹ Laws of Md., 1910, chap. 253.

⁷⁰ *The Harvard Law Review*, vol. XXIII, p. 169.

⁷¹ W. P. Pickett: *The Negro Problem*, pp. 259-84.

⁷² Kirby's Digest, 1904, sec. 2767.

⁷³ Const., 1880, art. II, sec. 1, as amended 1894.

⁷⁴ Const., 1876, art. VII, sec. 1, as amended 1893; Revised Stat., 1908, secs. 2027 and 2146-50.

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⁷⁵ Const., 1818, art. VI, secs. 2 and 3, as amended 1897; General Stat., 1902, secs. 1593-94.

⁷⁶ Const., 1831, art. IV, sec. 1.

⁷⁷ Const., 1887, art. VI, sec. 1; General Stat., 1906, sec. 170.

⁷⁸ Const., 1889, art. VI, sec. 2.

⁷⁹ Const., 1870, art. VII, sec. 1.

⁸⁰ Const., 1851, art. II, secs. 84-85; Burns's Stat., 1908, II, sec. 6877.

⁸¹ Const., 1881, art. II.

⁸² Const., 1859, art. V.

⁸³ Const., 1891, sec. 145.

⁸⁴ Const., 1819, art. II, as amended 1893.

⁸⁵ Const., 1867, art. I, secs. 1-3.

⁸⁶ Const., 1780, as amended 1821 and 1857.

⁸⁷ Const., 1850, art. VII, secs. 1 and 8.

⁸⁸ Const., 1858, art. VII.

⁸⁹ Const., 1875, art. VIII, secs. 2, 8, 10, and 11.

⁹⁰ Const., 1889, art. IX.

⁹¹ Const., 1866, art. VII.

⁹² Const., 1864, art. II.

⁹³ Public Stat., 1901, pp. 136-37.

⁹⁴ Const., 1864, art. II.

⁹⁵ Const., 1894, art. II.

⁹⁶ Const., 1889, as amended, sec. 121.

⁹⁷ Const., 1851, art. V.

⁹⁸ Const., 1907, art. III.

⁹⁹ Const., 1859, art. II.

¹⁰⁰ Const., 1874, art. VIII.

¹⁰¹ Const., 1842, as amended 1888, art. II.

¹⁰² Const., 1889, art. VII.

¹⁰³ Const., 1870, art. IV.

¹⁰⁴ Herron's Sup. to Sayles's Civil Stat., 1906, p. 165.

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- ¹⁰⁵ Const., 1895, art. IV.
¹⁰⁶ Statutes, 1906, p. 104.
¹⁰⁷ Const., 1889, art. VI.
¹⁰⁸ Const., 1872, art. IV, sec. 1.
¹⁰⁹ Const., 1848, art. III.
¹¹⁰ Const., 1889, art. VI.
¹¹¹ Code, 1907, part V, sec. 199.
¹¹² Revised Stat., 1901, sec. 2282.
¹¹³ Revised Laws, 1901, secs. 18, 60, and 63.
¹¹⁴ Organic Act, 1850, sec. 6; Compiled Laws, 1897, secs.
1647, 1672, and 1677-78.
¹¹⁵ *The Outlook*, vol. 91, p. 78.

CHAPTER XII

RACE DISTINCTIONS *VERSUS* RACE DISCRIMINATIONS

HERETOFORE, the writer has let the legislatures and courts speak for themselves, withholding personal opinions and refraining from making deductions from the facts revealed. Now, however, that the various race distinctions have been reviewed at some length, it may be worth while to consider what conclusions the facts warrant and what practical lessons they suggest.

RACE DISTINCTIONS NOT CONFINED TO ONE SECTION

Race distinctions are not confined to any one section of the country. This conclusion is the most patent of all. There is scarcely a State or Territory in the Union where legislative or judicial records do not reveal the actual existence of at least some race distinctions. Of the twenty-six States and Territories that prohibit intermarriage, more than half, extending from Delaware to Oregon, are outside the South. Negroes have, on account of their race, been excluded, usually contrary to the local laws, from hotels in Massachusetts, Pennsylvania, Indiana, New York, Wisconsin, Michigan, Ohio, and Iowa; from barber-shops, in Nebraska and Connecticut; from boot-black stands, in New York; from billiard-rooms, in Massachu-

RACE DISTINCTIONS NOT CONFINED TO ONE SECTION

setts; from saloons, in Minnesota and Ohio; from soda fountains, in Illinois; from theatres, in Illinois and New York; from skating rinks in New York and Iowa; and the bodies of Negroes have been refused burial with those of white persons in Pennsylvania. It is not meant here that Negroes are always excluded from such places in these States, but that instances of such exclusions are found in the laws. Most of the States have at one time or another made distinctions between the races in schools. California and other States of the Far West are demanding separate schools for Japanese. Ohio, Indiana, Illinois, and Iowa, besides other States of the Middle West, clash from time to time with their school boards for attempting to separate the races in schools. Delaware is diligent in providing separate schools for white persons and Negroes. In Massachusetts, until 1857, the school board of Boston provided a separate school for Negroes in that city. As to public conveyances, the term "Jim Crow," applied to a car set apart for Negroes, was first used in Massachusetts, and it was in Pennsylvania that the first leading case involving the right of street car companies to separate their passengers by race arose. Instances of actual discrimination against Negroes by common carriers were found in Illinois, Iowa, and California. How common race distinctions are in the States mentioned the above resumé does not clearly show, because the great majority of grievances caused by race distinctions do not reach the court. But when one finds that the legislature has deemed it advisable to enact a law against race distinctions, it is reasonable to assume that they did in fact exist. For instance, five States, all outside the South, prohibit discriminations by

RACE DISTINCTIONS *VERSUS* RACE DISCRIMINATIONS

insurance companies on account of race. Had these companies not evinced signs of discrimination against Negroes, such statutes would not have been enacted. It is well known that race distinctions are common in the South.

Were this general prevalence of race distinctions fully realized, the result would be a kindlier feeling one to another among the white people of the various sections. They would then see that the presence or absence of race distinctions is due, not to any inherent difference in the character of the people, but to diverse conditions and environment. When, therefore, the Negro children of Upper Alton, Illinois, are seen to constitute an appreciable percentage of the school population, the people of that town, as the people of a Southern town would do under similar circumstances, demand for them a separate school.

RACE DISTINCTIONS NOT CONFINED TO ONE RACE

Race distinctions are not confined to any one race. It is true that most of the statutes and judicial decisions above referred to relate to the Negro because he belongs to a race which is the largest non-Caucasian element in the United States. Where, however, other race elements exist in considerable numbers, similar distinctions are sanctioned. One finds, for instance, in California and other States of the Far West, where Japanese are numerous, laws prohibiting intermarriage between Mongolians and Caucasians, and requiring separate schools for the two races. Similar laws have been enacted wherever there is an appreciable number of Indians. Wherever, in other

RACE DISTINCTIONS NOT DECREASING

words, any two races have lived together in this country in anything like equal numbers, race distinctions have been recognized in the law sooner or later; and, before becoming legally recognized, have existed in practice.

RACE DISTINCTIONS NOT DECREASING

Race distinctions do not appear to be decreasing. On the contrary, distinctions heretofore existing only in custom tend to crystallize into law. As a matter of fact, most of the distinctions which are described above as the "Black Laws of 1865-68" are no longer in force. No State now carries statutes prescribing the hour when a Negro laborer must arise, requiring his contracts to be in writing, prohibiting him from leaving the plantation or receiving visitors without his employer's consent, or exacting a license fee of him before he can engage in certain trades. These laws were vestiges of the slave system and survived but a short time after that system had been abolished. Likewise, those statutes which prohibited Negroes from testifying in court against white persons were repealed during the first few years after Emancipation. But distinctions which are not the direct results of slavery have found an increasing recognition in the law. Thus, though Florida, Mississippi, and Texas had separate railroad coaches for freedmen in 1866, the regular "Jim Crow" laws did not begin to creep into the statutes of the Southern States till 1881. Now every Southern State, except Missouri, has a law separating the races in railroad cars. Mississippi, in 1888, was the first State to require separate waiting-rooms. Louisiana, in 1902, took the lead in compelling separate street car accommodations,

being followed by most of the Southern States within the last seven years.

A similar tendency toward crystallization of race distinctions into law is found in schools. Though Massachusetts permitted separate schools as early as 1800, and though the Southern States required them from the beginning of their public school system, it is only recently that any States have seen fit to create distinctions in private schools by legislation. At present, Florida, Kentucky, Oklahoma, and Tennessee prohibit the teaching of white and Negro students in the same private schools, and their action in so doing the Supreme Court of the United States in the Berea College case has decided to be constitutional. Moreover, the Japanese school question of the West has become of national concern only within the last two years.

In the matter of suffrage also one observes the same general trend of practices slowly passing into statutes. Between 1877 and 1890 Negroes in the South were disfranchised to a great extent in defiance of law. Beginning with Mississippi in 1890 and ending with Georgia in 1908, seven Southern States have made constitutional provisions which, though not in letter creating race distinctions, lend themselves to race discriminations.

That actual race distinctions still persist outside the South is shown by recent decisions. For instance, within a year, the Appellate Division of the Supreme Court of New York, in reducing damages awarded in the court below to a Negro porter for false imprisonment, held that by reason of his race, he did not suffer as much damage as would a white man under like circumstances. The

DISTINCTIONS NOT BASED ON RACE SUPERIORITY

New York *Times* of November 19, 1909, refers to a recent decision of the Supreme Court of Iowa as holding that a coffee company licensed under the State laws, being a private concern, has the right to refuse to serve a Negro.

Perhaps, as a whole, actual race distinctions in the United States are not increasing; but distinctions, formerly sanctioned only by custom, are now either permitted or required by law, and the number of recent suits in States outside the South indicates that actual discriminations are as prevalent as they have been at any time since 1865.

DISTINCTIONS NOT BASED ON RACE SUPERIORITY

What is the fundamental cause of race distinctions? No comparison of laws can formulate an answer to that question; but the personal observation of the writer leads to the belief that race distinctions are not based fundamentally upon the feeling by one race of superiority to the other, but are rather the outgrowth of race consciousness. If Negroes were in every way equally advanced with white people, race distinctions would probably be even more pronounced than now; because, in addition to physical differentiation,* there would be the rivalry of equally matched races. Thus, the widespread prejudice entertained by Gentiles toward Jews, resulting in actual, if not legal, distinctions, is due, not to any notion that Jews are intellectually or morally inferior to any people, but to a race consciousness which each possesses. The exclusion of the Japanese was due, not so much to an intellectual or moral inferiority of that race to the white race, as to a difference in their racial ideals. So long as two races living side by side have each an *amour propre*, the

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more numerous may be expected to prescribe distinctions to which the less numerous must submit; that is, until the spirit of universal brotherhood is a more compelling force than it is at present.

SOLUTION OF RACE PROBLEM HINDERED BY MULTIPLICITY OF PROPOSED REMEDIES

If the above generalizations are correct, they should enable one to draw some practical conclusions for dealing with race problems. The proper adjustment of race relations is being retarded by the multiplicity of suggested solutions, many of them conflicting and thus hindering one another, some of them parallel and necessarily duplicating expenditure of energy. For instance, some men, including both Negroes and white persons, believe that the proper solution of the race problem is the deportation of the Negro race; others, that it is the segregation of that race in some portion of the United States or colonization in some territorial possession; while others believe that the South should remain the permanent home of the majority of Negroes. Advocates of territorial separation of one sort or another think that efforts should be directed toward getting the Negro to his new home as soon as possible. Those who believe that the home of the Negro will remain in this country are divided upon the steps to be taken. Some of this class approve of further education of the Negro, being divided, however, into two overlapping groups, the one emphasizing literary training, and the other industrial. Others of this class maintain that any sort of systematic education of the Negro is only hastening an inevitable race conflict. In the midst of these con-

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flicting opinions, the Negro problem, instead of reaching a complete or even partial solution, is only being aggravated.

There is no need of prophesying what the final solution will be, but one is justified in believing that the inevitable changes will be gradual. Whether or not the final adjustment is a segregation of the Negro race, one can hardly expect it to come in one, two, or even six decades. A century hence the white people will probably be living side by side with Negroes as they do now. The duty of the American people is to act properly toward all races in their own lifetime: the far future will take care of itself. The difficult thing to ascertain is the proper mode of acting to-day. The solution of the race problem, when it does come, will doubtless be a composite result. The race relations are not the same in different sections of the country or in different States of the South or even in different counties of the same State. Though the proper steps now to be taken in the various sections or States or counties may be different, there can, in the nature of things, be but one best mode of action for each community. That must be one for which all people, regardless of race or section, may profitably strive.

SEARCH FOR A COMMON PLATFORM

A noticeable effort has been made during the past few years by students of race relations to construct a platform upon which all men of every race may stand and work together for the permanent settlement of all racial antagonisms. This is evidenced by the organization of late years of national movements which have enlisted the sup-

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port of men of different sections and races. One of these, the Southern Education Association, has been promoted by men from the North and East as well as by men from the South, by both Negroes and white people. Soon after the Atlanta riots of two years ago, a conference of Southern white men and Negroes was held at Atlanta, for the purpose of promoting harmony between the races in the South. Within a few months a conference of Northern and Southern white men has met in Washington City to consider the Negro problem. Still more recently a group of Southern students in Harvard University, realizing that the race relations were different in different localities of the South, have organized an informal club to study the practical problems arising out of the presence of the Negro in the South and to exchange ideas formed from observation and experience in their respective localities. There are other indications of a desire to work out a common set of principles by which everyone may be governed.

PROPER PLACE OF RACE DISTINCTIONS

Assuming that it is possible to formulate a platform deserving the approval of all races, it is appropriate for a student of any phase of race relations to suggest a plank for it. A student in the special field of race distinctions in American law may endeavor to show the place that such legal distinctions properly hold, bearing in mind all the while that the whole issue springs out of race consciousness as it actually exists to-day, not as it should be or as it may be in the distant future.

Let one imagine the existence of a Federal statute—waiving the question of its constitutionality—prohibiting

PROPER PLACE OF RACE DISTINCTIONS

States from legalizing race distinctions, so that all public places of amusement, accommodation, and instruction would be, so far as the law could make them, open to all persons, regardless of race. Such a measure, far from effecting its purpose, would doubtless be the beginning of extensive race discriminations. Once abolish separate hotel accommodations and the white race, wherever it is in the majority, would monopolize every hotel, leaving other races either to walk the streets or to find accommodations in private houses. Were separate street car accommodations forbidden in cities where there is a fairly large percentage of Negroes, if any passenger were forced to stand or be crowded off the car altogether, it would be the Negro. Were separate schools not permitted, Negro children might possibly be excluded from schools altogether in defiance of the law; but even if admitted, their interests, if different from those of the more numerous race, would have to be sacrificed. A further review of race distinctions now legally recognized would only more fully substantiate the conclusion that, with race feeling as it is, if such distinctions were not recognized and enforced, the stronger race would naturally appropriate the best for itself and leave the weaker race to fare as it could.

On the other hand, let one imagine that the same laws recognizing race distinctions as now exist in the South obtained in all communities where two races are nearly equal in numbers. Suppose, for instance, that separate hotels were permitted in all cities which receive an appreciable number of Negro travelers. Respectable Negroes might then secure comfortable entertainment in hotels provided for their race and thus escape the inconvenience

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and humiliation of being denied admission to hotels maintained exclusively for white persons. If separate schools were provided, Negro children would be free to pursue, unhampered by requirements prescribed for the more developed race and unembittered by continuous manifestations of race prejudice, a curriculum especially adapted to their own needs. Wherever separate railroad and street car accommodations were provided, a Negro might enter the car or compartment reserved for his race and go his way in peace, unmolested by the thoughtless or vicious of the other race. The result, therefore, of the honest enforcement of race distinctions would be to the advantage of the weaker race.

OBLITERATION OF RACE DISCRIMINATIONS

The people of the different sections and races, instead of inquiring into the truth or falsity of such a conclusion, have been agitating the theoretical right and wrong of race distinctions. Meanwhile, indications are that legalized race distinctions have been unfairly enforced. For instance, statutes require that equal accommodations be given Negro passengers in public conveyances; yet, while people have been debating the constitutionality and justification of the "Jim Crow" laws, railroad companies have been compelling Negroes to occupy uncomfortable and unsanitary coaches and waiting-rooms, and this though Negroes paid the same fare as white passengers. Furthermore, while they have been arguing the constitutionality of the suffrage laws of the South, white registrars have been putting unfair tests to Negro applicants for registration, and by so doing have made the laws a tool by

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which to work injustice to the Negro. While, finally, they have been strenuously discussing the school laws, Negro children have been suffering from, not only inadequate but, in many cases, improper training by ignorant Negro teachers.

In suggesting the benefits that would accrue to the weaker race from legalized race distinctions, it is assumed that such distinctions would apply only in communities in which two races live side by side in something like equal numbers. The white people of the South should recognize the inexpediency of requiring separate schools, separate railroad and street cars, separate hotels, and separate accommodations in general for the colored races in most places outside the South where they constitute, in many instances, not more than one-tenth of the total population. The white people in the places last mentioned should recognize that it would be equally unwise to crowd together white and colored races in schools, public conveyances, hotels, theatres, and other public places in the South. Colored people everywhere should realize that a race distinction is not necessarily a badge of racial inferiority, but may be simply a natural result of racial differentiation. Race distinctions may, therefore, have a very appropriate place in communities where, as has been said before, two races are about equal in numbers, at least where there are enough of the subordinate race to arouse in the dominant a feeling of race consciousness.

Where, under the above view, race distinctions are justifiable, and are enacted into law, the people of all races should unite in demanding that the laws be fairly applied. If, for instance, the presence of sufficient Negroes make

it advisable to separate the races in public conveyances, the white people should unite with them in demanding that they be given equal accommodations. The Negro who has paid a first-class fare is entitled to coaches and waiting-rooms as sanitary, comfortable, and convenient as those provided for white persons paying the same fare. With separate schools provided, they should insist that each race be given an equal opportunity to get the sort of training it most needs to do its work. This training may be different. The Southern Education Association¹ in session at Lexington, Kentucky, said: "On account of economic and psychological differences in the two races we believe there should be a difference in the courses of study and methods of teaching, and that there should be such an adjustment of school curricula as shall meet the evident needs of Negro youth." If it is true that the Negro child needs a different sort of training from the white, then it is a discrimination to give him the training peculiarly suited to the child of the other race. People may demand for the two races equal educational opportunities, and at the same time advocate different courses of study and methods of teaching.

In States which have added new qualifications for suffrage, both races may demand their impartial application. A Negro public spirited enough to pay his taxes, with education enough to read and write, or thrifty enough to accumulate the required amount of property should be allowed to register and vote as freely as a white man with similar qualifications. A white registrar who discriminates against a Negro applicant, by setting for him more difficult tests than are set for white applicants, is doing

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an injustice to the white people equally as great as that done to the Negroes. John B. Knox,² President of the Alabama Constitutional Convention of 1901, said at that time: "If we would have white supremacy, we must establish it by law—not by force or fraud. If you teach your boy that it is right to buy a vote, it is an easy step for him to learn to use money to bribe or corrupt officials or trustees of any class. If you teach your boy that it is right to steal a vote, it is an easy step for him to believe that it is right to steal whatever he may need or greatly desire." Speaking from the standpoint of the Negro, Dr. Booker T. Washington³ said: "As a rule, I believe in universal, free suffrage, but I believe that in the South we are confronted with peculiar conditions that justify the protection of the ballot in many of the States, for a while at least, either by an educational test, a property test, or by both combined; but whatever tests are required, they should be made to apply with equal and exact justice to both races." All people, white and black, should unite, not to secure the repeal of the suffrage laws, but to secure their enforcement with absolute impartiality.

The welfare of both races—and this conclusion applies equally to the other non-Caucasian races—requires the recognition of race distinctions and the obliteration of race discriminations. The races should be separated wherever race friction might result from their enforced association. The white race cannot attain its highest development when continually venting its spite upon the less fortunate race. Nor, indeed, can the Negro race reach its highest development when continually subjected to the oppressions of the more fortunate race.

RACE DISTINCTIONS *VERSUS* RACE DISCRIMINATIONS

Such a recognition of race distinctions and such an obliteration of race discriminations as are here advocated constitute principles by which all people, of every section and of every race, may stand and labor for the promotion of good feeling between all sections and harmony between all races.

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¹ Raleigh, N. C., *News and Observer*, Dec. 31, 1907.

² Proceedings of the Ala. Const. Conv., 1901, p. 12.

³ Booker T. Washington: "Up from Slavery," p. 237.

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¹ The number in parentheses refers to the note; the other number, to the page.

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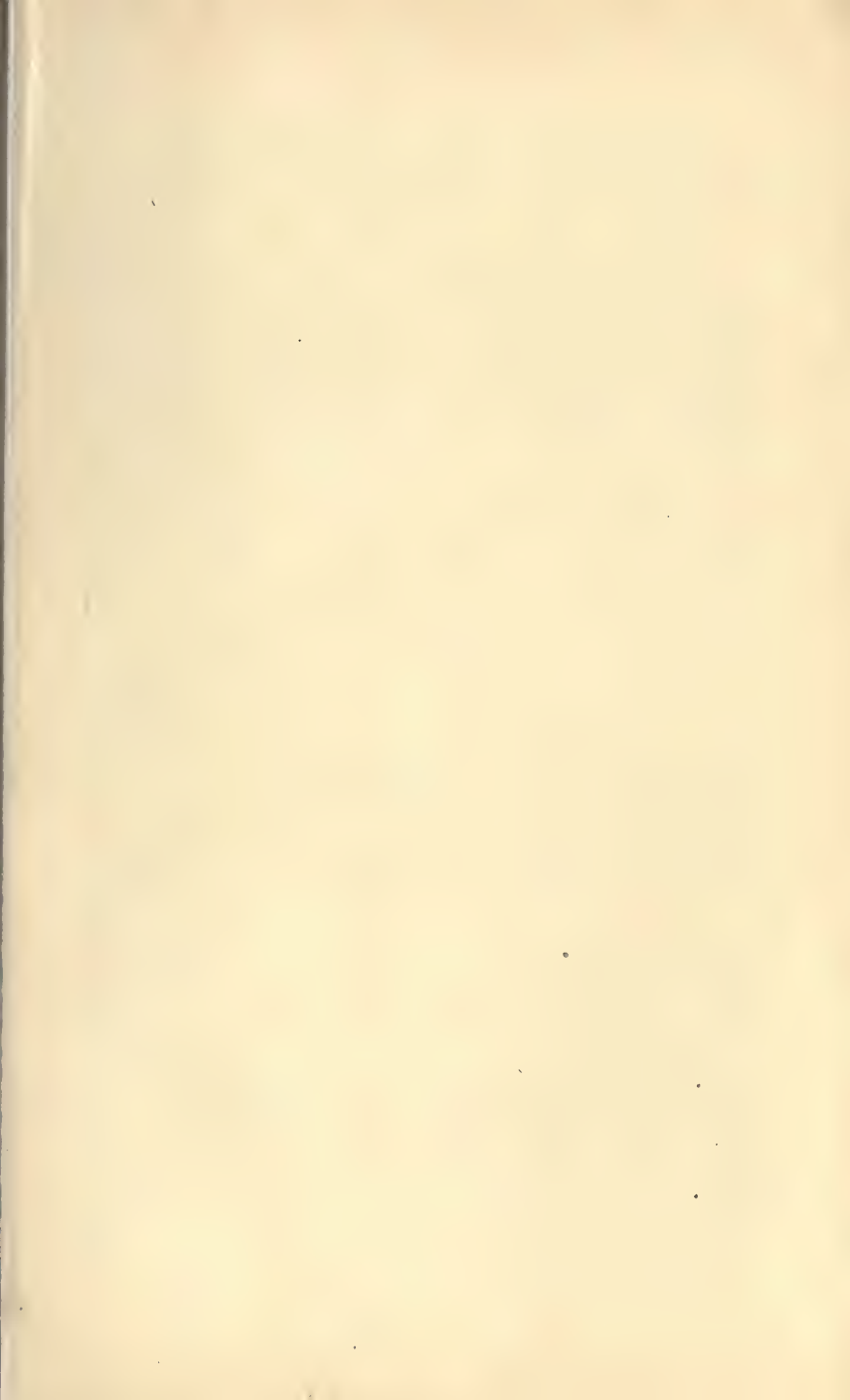
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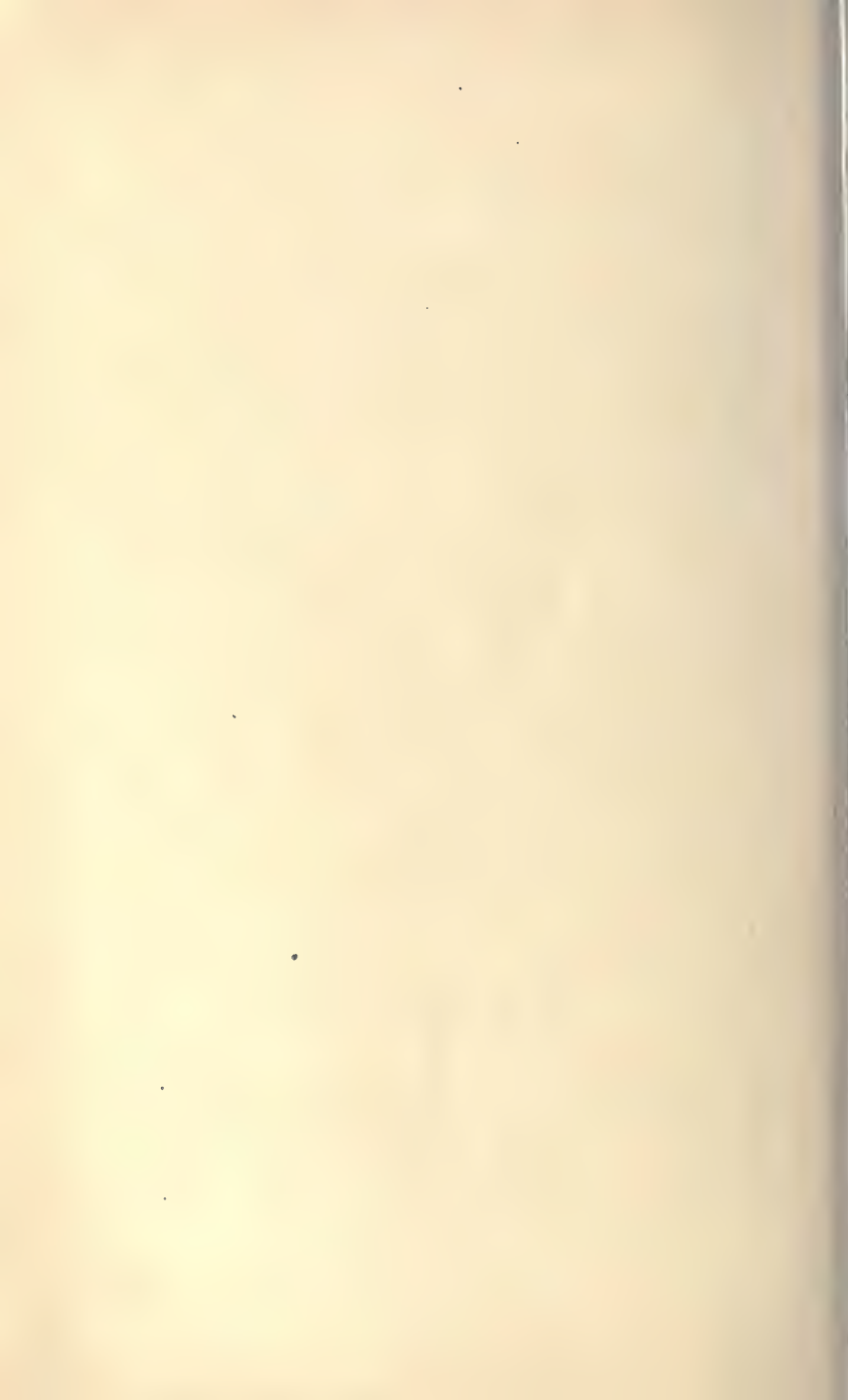
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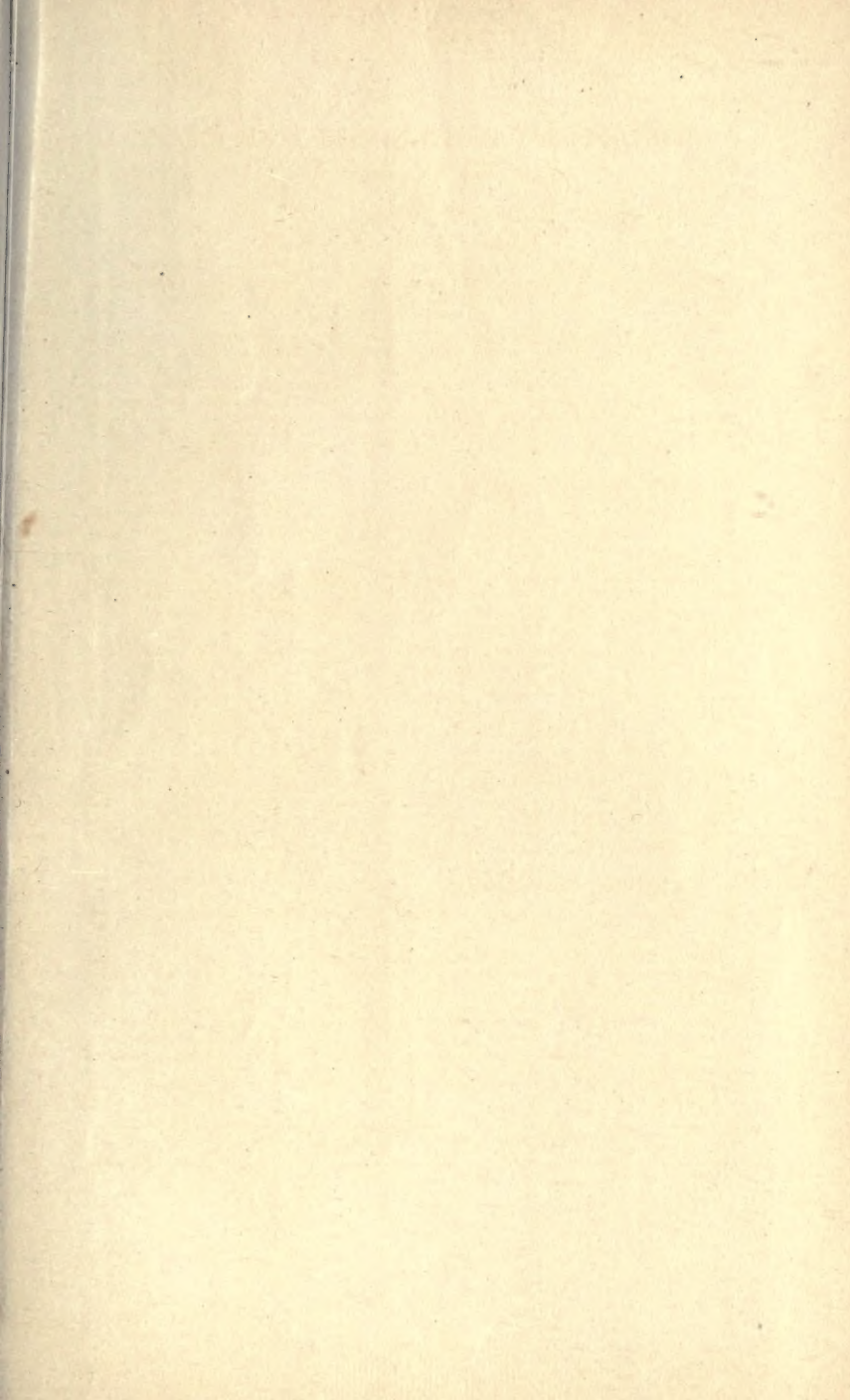


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